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THE LAW
OF
EMINENT DOMAIN.

THE LAW
OF
EMINENT DOMAIN
IN
THE UNITED STATES.

BY
CARMAN F. RANDOLPH.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1894.

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TO

CORTLANDT PARKER,

THE HONORED LEADER OF THE NEW JERSEY BAR.

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PREFACE.

SOME years ago I wrote an article on the right of eminent domain for the "Law Quarterly Review." My interest in the subject led me to write the following treatise. While I have availed myself of the work of previous writers on eminent domain, especially the learned researches of Mr. Mills and Mr. Lewis, I have not accepted text-book statements of law because of faith in their sponsors, but have tested them by examination of the adjudged cases. The responsibility of an author for all errors of omission or commission I accept literally, for I have not only examined every case cited, but have performed the whole work of searching for cases.

It has been my endeavor to present the law of eminent domain as it obtains in this country, with such reference to foreign, especially English, law as will accentuate the peculiarities of our own law or illustrate the principles common to both.

I had not progressed far in my research before I became embarrassed with the great and constantly increasing mass of case law. Two courses were open to me, — to cite all cases interpreting the voluminous condemnation laws of the several States, and attempt

to set forth the minutiae of local practice ; or to state as simply and clearly as possible the principles of the law, together with those cardinal rules of procedure which, once apprehended, will guide the practitioner through all the variations of local and transitory practice. I chose the latter course.

The social and political bearings of the right of eminent domain are pronounced, and the field for speculation and suggestion is tempting and profitable. But this field is beyond my province. This much I may say here, however, — those who view the power of the state exemplified in the right of eminent domain as a menace to the rights of individuals may comfort themselves with the knowledge that in this country the duty of the state to pay for what it takes is a bulwark against many forms of spoliation under the guise of law. The organic law of the United States contains a premise and a conclusion not found in the logic of advanced socialism. Private property exists ; if it is taken for public use it must be paid for.

CARMAN F. RANDOLPH.

MORRISTOWN, NEW JERSEY,
July, 1894.

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N.	Northern Reporter.
N. E.	Northeastern Reporter.
N. W.	Northwestern Reporter.
N. Y. Supp.	New York Supplement.
P.	Pacific Reporter.
So.	Southern Reporter.
S. E.	Southeastern Reporter.
S. W.	Southwestern Reporter.
S. Ct.	Supreme Court.

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THE LAW OF EMINENT DOMAIN.

CHAPTER I.

THE EMINENT DOMAIN.

§ 1. The right of eminent domain enables the state to take private property for public use upon payment of compensation. The power is singular among the sovereign powers over property. It is the only power the exercise of which invariably provokes a direct issue between the man and the state. A man must pay a lawful tax, and submit to a lawful restriction upon the use of his property, without question. But where his property is taken, he is entitled to have its value determined by an impartial tribunal. The right is essentially material. Political sentiment may affect taxation, moral sentiment the police power, but these rarely affect the right of eminent domain. Of all state powers this effects the most direct practical results. It has made possible our extensive systems of highways, railroads, and waterworks, and has ministered to our material well-being in other notable ways.

The constant and varied applications of the right have created a great body of law. It is our purpose to determine the principles of this law, and the rules which govern its application.

§ 2. "Eminent domain" seems to be derived from the *dominium eminens* of Grotius. It has been suggested that the term is sufficiently broad to cover "the whole range of police powers and property regulations,"¹ and Dr. Whewell, in translating Grotius, writes "eminent dominion." Now there is no objection to re-

¹ 1 Bench and Bar, 112; see 2 Kent's Comm. 339.

ferring all governmental powers over property to an eminent dominion, yet wherever a manifestation of sovereignty creates a well-defined body of law, it is proper to give it a distinctive title. An accurate terminology is as greatly to be desired in law, as in the exact sciences. Eminent domain has been also used with reference to the property of the state,¹ but this meaning is inapt, as it does not involve that sense of superiority which is of the essence of the right. The term thus used seems to be an unnecessary substitute for the public domain. The suggestion that where a corporation lawfully constructs its works in a public street it exercises the equivalent of the eminent domain,² seems to be open to somewhat the same criticism. The weight of authority, and common usage in this country, where the term has been accorded a more definite position than elsewhere, unite in interpreting eminent domain (*dominium eminens*) as a peculiar power over private property.³ The paraphrasing of *dominium* into *domain*, instead of translating it *dominion*, inexact in that it substitutes a thing controlled for the right to control it, emphasizes this meaning.

Eminent domain is defined to be the right of the state to take private property for public use, on payment of compensation.⁴ It does not follow, however, that every law prescribing compensation for damage done to property in furthering public uses is referable to the eminent domain. Where compensation is allowed where it could not be claimed as of right, as, for example, where it is prescribed that compensation shall be paid for property damaged, or injuriously affected,⁵ there is no recognition of the obligation of the eminent domain, but rather an expression of its inadequacy to secure substantial justice to the owner of property.

§ 3. The theory has been advanced that all land is held of the state, and that the state in expropriating it simply resumes

¹ Gold Hill Min. Co. v. Ish, 5 Or. 104; Cooley, Const. Lim. (6th ed.) 643. But see 2 Kent's Comm. 339, n.

² Gibbs v. Baltimore Gas Co., 130 U. S. 396.

³ Bonaparte v. Camden & A. R., Bald. C. C. 205; Am. Cyc., *Eminent Domain*;

Webster's Dict.; Cent. Dict. See also Holland's Jurisprudence (6th ed.), 336.

⁴ Vattel, Law of Nations, § 244; Ahrens, 2 Droit Naturel, 159; Erakine, An Institute of the Law of Scotland (ed. 1881), 251. See also the last note.

⁵ See §§ 153-157.

an original grant.¹ It is not necessary to thresh the vexed questions as to the origin and tenure of private property in land, to find the refutation of this theory. The unquestioned fact that the state is the ultimate reversioner of land is irrelevant, for the state is no less the final legatee of personal property, to which it never could have had title. In both capacities the property is acquired through escheat, wherein the state, so far from asserting a right superior to private ownership, steps in only upon its termination.² Further, the eminent domain of the United States over land within a state cannot depend on original grant, at least in the first group of commonwealths. There must be a common basis for federal and state eminent domain, and it is found in sovereignty pure and simple. From this standpoint the status of the eminent domain is readily determined. It is the extreme prolongation of that accepted right of state control over property manifested in taxation and police regulation.

Historical Sketch.

§ 4. A brief sketch of the rise and development of the right of eminent domain may be not without interest. The story of Naboth's vineyard has been solemnly cited by Merlin as the earliest instance of expropriation.³ In the Athenian Constitution of Aristotle,⁴ we are told that a quarrel between Athens and Eleusis was settled upon this condition among others: "If any of the seceding party (discontented Athenians) wished to take a house in Eleusis, the people would help them to obtain the consent of the owner; but if they could not come to terms they should appoint three valuers on either side, and the owner should receive whatever price they should appoint."

The eminent domain does not appear to have been well established in early Roman law. Indeed, there is some reason to believe that state control over private lands would have been inconsistent with private rights as understood in Rome. The

¹ *Heyward v. New York*, 8 Barb. *People v. Trinity Church*, 22 N. Y. 486; *Union El. Ry.*, 113 N. Y. 275; 44. *Biddle v. Hussman*, 23 Mo. 597.

² See Lord Bramwell, *Property*, 361. ³ 29 *Répertoire de Jurisprudence*, 361. ⁴ *Kenyon's Trans.* 72. *Nineteenth Century* for March, 1890;

testimony of the straight military roads seems, however, to point so directly to a power of compulsory acquisition that Bluntschli suggests that special statutes were enacted to meet emergencies, comparing in this respect Roman with English practice.¹ This suggestion implies, of course, a clear right of eminent domain. The apparent conflict on this point may be of small moment in view of the peculiar conditions of Roman land tenure. Apart from the small territory known as *Ager Romanus*, the Italian peninsula was held by the state by right of conquest. A portion of this land was sold outright, and so became *ager privatus*. The rest remained *ager publicus*, and was gradually taken up by the patricians and their retainers, whose occupancy ripened into possession. The vast extent of these possessory holdings is shown by the fact that for centuries they formed the bulwark of patrician power, and the chief cause of complaint against it. While Quiritarian, or absolute private property, increased in Italy through the planting of burgess colonies, and the conferring of Roman right upon municipalities and individuals, the property in provincial land was for a long period almost wholly Bonitarian. The distinction between these estates was not formally abrogated until the reign of Justinian.² It is possible, then, that in the earlier period of Roman administration the necessary public works were built upon land held by the state as possessor or landlord, and that Quiritarian property was taken only upon consent.

§ 5. As the eminent domain is active only where there is a desire for public works, tempered by a decent respect for private property, we need not look for its common use during the earlier stages of modern civilization. Nor are there many examples of expropriation with compensation under the feudal system, under which private rights in land were subject to the claims of the overlord.³ It should be noted that roads, obviously in time

¹ Theory of the State, English Trans. 238.

² See Savigny, Possession, Perry's Trans. 76.

³ See Pradier Fodéré's note to Vattel, Droit des Gens, 224. An ordinance of Philip the Fair is worth quoting as

one of the earlier eminent domain statutes: "Possessores possessionum quas pro ecclesiis aut domibus ecclesiarum parochialium de novo fundandis aut ampliandis infra villas, non ad superfluitatem sed ad convenientem necessitatem acquiri contigit, ad eas dimitten-

the earliest as in character the most important works of public interest, were, apart from the old Roman roads and ancient trackways, either connecting ways of necessity, or private toll roads, or if formally laid out as public ways, were usually opened over unimproved lands without compensation.

If it were necessary to bolster up every public power with an ancient pedigree, the genealogy of the eminent domain would be quite unsatisfactory, — a small collection of decrees scattered through several centuries, and nearly all shadowed by a doubt as to their equitable enforcement. Until private property in land becomes the rule, and is fully protected by law, and until the legitimate needs of a high civilization frequently demand its surrender, there is little room for the eminent domain as we understand it.

Whatever early practice may have been, the eminent domain finds its authoritative suggestion in the Rights of War and Peace of Grotius: "We have elsewhere said,¹ that the property of subjects is under the eminent dominion of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute."² During the seventeenth and eighteenth centuries the manifestations of the eminent domain increased, owing to the extension and gradually centralized administration of public works, and the growth of equitable juridical ideas. As necessary highways could not be opened in many cases without affecting improved property, a law was passed in France providing indemnity for the taking of houses, timber, and vineyards, the measure

das pro justo pretio compelli debent."
Merlin, Répertoire de Jurisprudence, —
Retraite d'Utilité Publique.

¹ B. ii. c. 14, §§ 7-8; iii. c. 19, § 7.

² B. iii. c. 20, § 7.

of damages being the value of the property less its value as arable land.¹ The eminent domain was also exercised in favor of canals and the reclamation of marshes. But while the theory of eminent domain had become fixed in ethical jurisprudence, and had obtained a certain recognition in legislation, it had hardly attained to the dignity of an accepted rule of action. The incorporation of the eminent domain in constitutions and codes marks its establishment as a definite power.

Comparative View of the Eminent Domain in Several Countries.

§ 6. The history of the eminent domain in France during the past century illustrates the doctrine under a system, constitutional it is true, yet differing from both American and English ideas of constitutional polity. Article Sixteen of the Declaration of Rights of 1789 reads, "Property being an inviolable and sacred right, no one can be deprived of it unless the public necessity plainly demands it, and upon condition of a just and previous indemnity." This article was incorporated in the Constitution of Sept. 14, 1791. The *Code Napoleon* declares, "No one is obliged to transfer his property unless it be for public utility, and in consideration of a just and previous indemnity."² The Charters of 1814 and 1830 contain declarations resembling that in the Constitution of 1789, substituting "public interest" for "public necessity."

A comparison of legislation with constitutional declaration often shows the infirmity of mere constitutional commands not enforceable by a judiciary vested with the power of authoritative interpretation. Thus, while the Act of Sept. 7, 1790, conformed to the spirit of the eminent domain by placing the assessment of compensation within the competency of the judiciary, the Assembly by a later law transferred the assessment to the administration, and in an act relating to the draining of marshes confirmed the jurisdiction of prefectural councils in the matter of compensation. Napoleon, impressed with the injustice of this practice, recommended the replacement of the assessment within

¹ Dumay, *Chemins Vicinaux* ii. 748. form or substance in most of the Euro-

² Art. 545. This Article appears in pean Codes.

the power of the judiciary.¹ This recommendation was acted on in the law of March 8, 1810. The comprehensive statute or code of 1841, "Expropriation for the sake of public utility," modelled on the Act of 1833, is the basis of present practice.

§ 7. The plenary power of Parliament discourages the treatment of English constitutional questions in any but the most practical fashion. The only guide to what Parliament may do, is what Parliament has done. It might be fanciful to say that this very perfection of legal irresponsibility has proved a moral check on its abuse; but certain it is that the right of private property upheld by the common law has been hitherto no more qualified by legislation in England than here, if we except the Artisans' Dwellings Acts and a few others, which advance the list of public uses beyond the present American terminus. Blackstone does not follow the continental jurists in treating the eminent domain as a positive power, but, declaring the inviolability of private property, insists that if the state does take it compensation should be made.² That there is no "eminent domain" in English jurisprudence is because the power is included, and the obligation to compensate lost, in the absolutism of Parliament. The only technical term approximating to "eminent domain" is "compulsory powers," as used in acts enabling municipal and other corporations to take property for their use. The multiplication of such acts led to the enactment of several general laws, notably the Lands Clauses Consolidation Act of 1845, which is a complete code. This Act, or one of the others of a similar class, as the Railways Clauses Consolidation Act, is incorporated by reference in the various special acts.

The bulk of the English law is naturally of local interest only so far as the preparation of American cases is concerned, though our legislators might often mark with profit its comprehensiveness, its clearness, and the general equity of its provisions. Parts of this law, however, especially the "compensation clauses," are, together with the explanatory decisions, of practical interest

¹ Notice de Schoenbrunn, Sept. 29, 1809. See Dalloz, *Jurisprudence Générale*, xxiii. 501 n.

² Comm. i. 139.

to the American lawyer.¹ But in consulting English authorities, regard must be paid to the radical difference between English and American statute law.² The lawmaking power in this country is subjected to constitutional restrictions. Parliament is a law unto itself. Therefore the only question to be put in an English court is, — What does the act mean? In this country a further question may be put. Is the act constitutional? An English court will compel promoters to show that the statute confers compulsory powers.³ It will confine these powers within the strictest limits warranted by the act.⁴ It will define an obligation to compensate as broadly as the act will allow.⁵ But it will give effect to a grant of power which could not be sustained in this country. For example, compulsory powers were granted and commissioners appointed to assess compensation. The commissioners were to appoint successors, but died without having made the appointment. It was held that the right to compensation had failed, but that the powers could still be exercised.⁶

The exercise of the eminent domain in the United States, England, and the countries wherein the civil law obtains, accord in this respect, that where a right to compensation exists, its due enforcement is secured. In the United States constitutional declarations expounded by an independent judiciary establish a more restricted field for state intervention than is possible under the conditions of constitutional government in other countries.

COMPARATIVE VIEW OF THE EMINENT DOMAIN AND KINDRED POWERS.

§ 8. The eminent domain is but one of several manifestations of state power over private property. The powers of necessity, war, police, and taxation are commonly listed as the other arms

¹ *Delaplaine v. Chicago & N. R.*, 42 Wis. 214; *Grand Rapids & I. R. v. Heisel*, 47 Mich. 393. See *Stanwood v. Malden*, 157 Mass. 17.

² See *Crawford v. Delaware*, 7 Ohio St. 459; *Eaton v. Boston, C. & M. R.*, 51 N. H. 504.

³ *Lamb v. North London R.*, L. R. 4 Ch. 522.

⁴ *Webb v. Manchester & L. R.*, 1 Ry. Cas. 576; *Reg. v. Wycombe R.*, L. R. 2 Q. B. 310; *Herron v. Rathmines, etc.* Imp. Comm. (1892), A. C. 498. See *Galloway v. London, L. R. 1 H. L. 34.*

⁵ *Hull & S. R.*, 5 Ry. Cas. 458.

⁶ *Kennet & A. Nav. Co. v. Witherington*, 18 Ad. & El. n. s. 531.

of sovereignty. It is important, therefore, to define these powers in order that the true field of the eminent domain may appear.

Necessity.

§ 9. To conform to a familiar classification of sovereign powers we have referred to the power of necessity. The most notable examples of this power are in cases where it is asserted in justification of the destruction of property to stay the spreading of fire. Such an act, whether committed by persons acting of their own motion or in obedience to official orders, is, if done in the exercise of a wise discretion, a justifiable trespass at common law.¹ When the exercise of this primitive right is subjected to statutory regulation, the statute simply recognizes the right, and compensation if given at all can be claimed only for the property, and in the manner, specified.² The destruction of a building so permeated by infection as to be a source of imminent danger, has been justified on the score of necessity.³ But the law of necessity has been vainly invoked to warrant the appropriation of a private house for a small-pox hospital, under a statute merely empowering the authorities to provide such an hospital,⁴ and the summary laying out of a road in place of one destroyed by flood.⁵ It appears, however, that where land is in imminent danger of being flooded, a levee may be built on private property without first instituting formal proceedings to condemn.⁶

It seems to the writer that "necessity" as indicating a particular sovereign power should be discarded as indefinite. Necessity is the root of sovereignty, not a branch. Furthermore, it is as potent a plea on behalf of a man as of a state. Acts of state which rely on necessity for their justification may be always

¹ *Mouse's Case*, 12 Coke, 63; *American Print Works v. Lawrence*, 21 N. J. L. 248; s. c. 23 N. J. L. 590; *Russell v. New York*, 2 Denio, 461; *Bowditch v. Boston*, 101 U. S. 16; *Field v. Des Moines*, 39 Ia. 575. See also *McDonald v. Redwing*, 13 Minn. 38.
² *American Print Works v. Lawrence*, 21 N. J. L. 248; *Stone v. New York*, 25 Wend. 156; *Taylor v. Plymouth*, 8 Met. 462.
³ *Meeker v. Van Rensselaer*, 15 Wend. 397.
⁴ *Markham v. Brown*, 37 Ga. 277. See also *Mitchell v. Rockland*, 45 Me. 496.
⁵ *Holden v. Cole*, 1 Pa. 303.
⁶ See *Penrice v. Wallis*, 37 Miss. 172.

referred to a more definite power, — in the fire cases mentioned, to the power of police. It seems convenient then to let the maxim *necessitas inducit privilegium* stand chiefly for the justification of private trespasses, such as a circuit over private property in order to avoid an obstruction in a highway.

War Power.

§ 10. In time of war, the state may find it necessary to assume dominion over property without the consent of its owner. When the property of enemies is confiscated, there is of course no obligation to compensate. Further, if the war power be exerted to destroy property in danger of falling into and strengthening the enemy's hands, there is no liability to the owner.¹ The act is justifiable on much the same grounds as warrant the destruction of property to stay a conflagration. But where the property of friends is taken in war, because of its utility to the government, there is a clear exercise of the eminent domain.² Hence, where the United States assume control over private property for military purposes they are liable on an implied contract to pay its value.³

Police Power.

§ 11. The police power is insusceptible of strict definition. Its characterization by Chief Justice Taney in the License Cases,⁴ as the power of the sovereign of "governing men and things within its dominions," is intentionally vague, and Chief Justice Shaw said,⁵ "It is much easier to perceive and realize the existence and source of this power, than to mark its boundaries or prescribe limits to its exercise." Although attempts have been made to make definite that which these masters of the law shrank from defining, they have not been successful. The most that can be said is that if a sovereign interference

¹ *Mitchell v. Harmony*, 13 How. 115; 623; *Mason v. United States*, 14 Ct. Cl. Ford v. Surget, 97 U. S. 605; *United States v. Pacific R.*, 120 U. S. 227; 59.

Bronson v. Woolsey, 17 Johns. 46. ⁴ 5 How. 504.

² *Cunningham v. Campbell*, 33 Ga. 625. ⁵ *Commonwealth v. Alger*, 7 Cush. 53. See also Justice Miller in the *Slaughter House Cases*, 16 Wall. 36, 62.

³ *United States v. Russell*, 13 Wall.

with property cannot be referred to the comparatively well defined powers of taxation, or eminent domain, it may be usually referred to the elastic power of police.

A somewhat extended consideration of the police power over property is necessary in order that the distinction between it and the eminent domain may be appreciated, for legislation is often assailed on the ground that under cover of the police power it effects an appropriation of property to private use, or to public use without compensation.

§ 12. *Destruction of Property or Prohibition of its Use.* — Property essentially harmful to public health, safety, or morals may usually be destroyed without compensation. Thus, it has been held that the state may freely destroy infected property.¹ But if the property is in fact innocuous, its destruction, even under a reasonable impression of its harmfulness, is unwarranted.² Further, if specific property is not essentially injurious, and therefore can be fairly said to come into existence under the protection of the law, it cannot be destroyed, or rendered absolutely worthless, by virtue of retroactive legislation. Hence it was held in the leading case of *Wynehamer v. The People*,³ that a statute prohibiting the sale of liquor lawfully made was invalid as attempting to deprive its owner of property without due process of law.⁴ Where municipal authorities lawfully grant a permit to erect a frame building, and the grantee makes contracts for the building and begins work, he has a vested interest in the building which cannot be disturbed by a subsequent ordinance forbidding the erection of frame buildings within certain limits.⁵ A statute authorizing the killing of diseased animals by officers of societies for the prevention of cruelty to animals, and the payment to their owners of their value impartially determined, has been so far likened to an

¹ *Theilan v. Porter*, 14 Lea, 622; *Raymond v. Fish*, 51 Conn. 80. See also *Meeker v. Van Rensselaer*, 15 Wend. 397; *Dunbar v. Augusta*, 90 Ga. 390.

² *Newark &c. Horse R. v. Hunt*, 50 N. J. L. 308; *Miller v. Horton*, 152 Mass. 540. See also *People v. Board of Health*, 140 N. Y. 1.

³ 13 N. Y. 378.

⁴ See also *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25.

⁵ *Buffalo v. Chadeayne*, 134 N. Y. 163.

eminent domain act that it was held invalid because it did not provide for proper notice to the owners.¹

§ 13. The state may exert its police power to prohibit certain uses of property. Thus, laws prohibiting the manufacture and sale of liquor have been generally sustained, and it was held in *Mugler v. Kansas*,² that the owner of a brewery built before the passage of an act forbidding the brewing of beer, should not have compensation for the loss of the use of his structure.³ So the state may prohibit the further use of a cemetery as a place of sepulture;⁴ establish fire limits within which wooden buildings shall not be erected,⁵ nor those already in existence be restored in the event of their partial destruction;⁶ and forbid the pollution of water-courses.⁷ An extreme instance of legislative control over the use of private property in the interest of public health, is the prohibition of rice culture within the limits of a village, and the restriction of general agriculture therein to one-eighth of an acre to each household.⁸

The state may impose conditions on the use of property in the interest of public safety and morality. Under this head may be noted such familiar statutes as those requiring a license for the sale of liquor, prohibiting the making of explosives in certain places, and regulating the sale of poisons.

§ 14. In most of the cases cited, the action of the legislature is predicated upon an assumed detriment to the public health, safety, or morals. Hence the vital question: Is the legislative declaration that a commodity, or calling, or use of property is absolutely or conditionally noxious, conclusive? This question is generally answered by the courts in the affirmative, because the cases seem to present matters of fact and expediency wholly within the competency of the legislature. But in some cases,

¹ *King v. Hayes*, 80 Me. 206. See also *Brill v. Ohio Humane Soc.*, 4 Ohio C. C. 358. ⁵ *Fiske's Case*, 72 Cal. 125; *Klingler v. Bickel*, 117 Pa. 326; *Hine v. New Haven*, 40 Conn. 478.

² 123 U. S. 623, overruling *State v. Walruff*, 26 Fed. Rep. 178. ⁶ *Brady v. Northwest Ins. Co.*, 11 Mich. 425.

³ See also *Kidd v. Pearson*, 128 U. S. 1. ⁷ *State v. Wheeler*, 44 N. J. L. 88.

⁴ *Coates v. New York*, 7 Cowen, 585; 56. ⁸ *Summerville v. Pressley*, 33 S. Car. Kincaid's Appeal, 66 Pa. 411. See *Austin v. Murray*, 16 Pick. 121.

the legislative assertion of harmfulness has appeared to the courts to be so utterly without foundation as to strip the statute of all claim to respect.¹ In *Jacobs' case*² the limit of judicial forbearance was overpassed, and the court, in a strong opinion, declared unconstitutional a statute prohibiting the manufacture of tobacco in tenement houses. Said Judge Earl: "We must take judicial notice of the nature and qualities of tobacco." The principle of this case is, that where legislation is intended to cure an evil, the existence of the evil and the relation of the remedy to it may be passed upon by the judiciary without trenching on the legislative prerogative. This principle was applied in *People v. Marx*,³ where the statute in question was entitled "An Act to prevent deception in the sale of dairy products." The act prohibited the manufacture and sale of the product known as oleomargarine, "designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same." The court declined to hold that the sale of a wholesome product which resembled butter was necessarily a fraud upon purchasers. The frank contention of the respondent's counsel, that even though the act was designed to relieve the dairyman from the competition of a cheaper article than butter, it was still a valid exercise of legislative power, was met by the declaration that the legislature could do no such thing. So, in *People v. Gillson*,⁴ the validity of a statute making the presentation of gifts to purchasers of food a misdemeanor was in question, and the court could not perceive any covert attack on the public morals in the presentation of a cup and saucer to the purchaser of two pounds of coffee. But the measure of judicial responsibility accepted in the opinions just cited, has not always been accepted elsewhere. In *Powell v. Pennsylvania*,⁵ a statute prohibiting the manufacture and sale of oleomargarine was sustained as a valid exercise of the police power. The opinion asserts, in effect, that the legislature having concluded that the only way to prevent the sale of wholesome oleomargarine to the deception of purchasers, and of unwholesome to their injury, is to prevent its sale

¹ *Sam Kee's Case*, 31 Fed. Rep. 680; ⁴ 109 N. Y. 389.
Quintini v. Bay St. Louis, 64 Miss. 483. ⁵ 127 U. S. 678, affirming s. c. 114
² 98 N. Y. 98. Pa. 265.
³ 99 N. Y. 377.

altogether, the court cannot say that there is an unlawful prohibition against those who wish to sell wholesome oleomargarine as such.¹

The state cannot declare that the driving of piles in a certain river is presumptively injurious, and enable any taxpayer to enjoin such action without proof of injury.² Nor can it decree that one shall not offer stabling accommodation for hire on property near the grounds of an agricultural society.³

§ 15. **Imposition of Burdens on Ownership.** — There are many statutes which command the doing of things for the public welfare, the performance of which necessitates an expenditure of money. These statutes have been frequently attacked on the ground that they effect a taking of property, that is, the money expended, without compensation. Most of these attacks have failed. The courts have treated these statutory commands as mere police regulations.⁴ The state may compel railroad companies to construct gates, fences, cattle-guards and other appliances for the safety of persons and property,⁵ to raise or lower the grade of the roadbed,⁶ to test their employees for color blindness.⁷ It is not a taking of property to compel the owner of land abutting on a street to clear the sidewalk of snow at his own expense.⁸

Where the imposition of a burden on property is justified by virtue of the police power, it is because the legislature commands the owner to perform a duty which he owes to the public. But if the act commanded is not in the line of the owner's duty, the state cannot compel its performance without making compensation.⁹ Thus in *Millett v. People*,¹⁰ the court declared a

¹ See also *State v. Addington*, 77 Mo. 110. *v. Rutland & B. R.*, 27 Vt. 140. See also *English v. New Haven & N. Co.*, 32 Conn. 240. See *People v. Lake Shore & M. S. R.*, 52 Mich. 277.

² *Janesville v. Carpenter*, 77 Wis. 288. ³ *Commonwealth v. Bacon*, 13 Bush, 210. ⁴ *Woodruff v. N. Y., etc. R.*, 59 Conn. 63.

⁵ *Parker v. People*, 111 Ill. 581; *State v. Wabash, S. & P. R.*, 83 Mo. 144. See also *Comm. v. Holyoke Water Power Co.*, 104 Mass. 446. ⁷ *Nashville, C. & S. L. R. v. Alabama*, 138 U. S. 96.

⁶ *Minneapolis & S. L. R. v. Emmons*, 149 U. S. 364; *Illinois Cent. R. v. Willenborg*, 117 Ill. 203; *Emmons v. Minneapolis & S. R.*, 35 Minn. 503; *Thorpe*

⁸ *Carthage v. Frederick*, 122 N. Y. 268. But see *Chicago v. O'Brien*, 111 Ill. 532. ⁹ *Washington Bridge v. Connecticut*, 18 Conn. 53. See § 165.

¹⁰ 117 Ill. 294.

statute invalid, because it imposed upon operators of coal mines the burden of erecting scales for the weighing of the coal mined, and offering the results for public inspection. The object of the statute was to afford security to the operatives, who were paid by weight, and the court held that, assuming this to be a public purpose, it could be attained only by making good the expense incurred. In *Commonwealth v. Pennsylvania Canal Company*,¹ the company successfully resisted the attempt of the State to saddle them with the cost of making fishways in their dams. It was held that while the State could make fishways by virtue of its police power, it had not, in granting the company's charter, reserved the right to compel their construction. The legislature cannot compel a railroad company to lease land at a station for the use of a grain elevator at a nominal rent.² A statute commanding persons to exterminate squirrels on their own lands has been declared invalid.³

§ 16. **State Control over Contracts.** — The normal attitude of the state toward the making of contracts is one of assistance not interference. The state sets up standards of value, weight, and measure, so that contracts made with reference to them shall have a universal definiteness. It provides legal machinery whereby valid agreements may be enforced, invalid ones abrogated. But it does not usually declare that an agreement shall be made, nor, if made, what its consideration shall be. Usury laws are exceptional. The state has long assumed that an unrestricted price for the use of money is a public evil, and the only question to-day with regard to these laws is as to their expediency. Statutes regulating wages were formerly common in England,⁴ and appear to have found favor in certain American Colonies.⁵ Although a city ordinance regulating the price of bread seems to have been approved in an early American case,⁶ state interference in the matter of prices has never obtained a footing in this country, and is now practically obsolete in England.⁷

¹ 66 Pa. 41.

² *State v. Chicago, M. & S. P. R.*, 36 Minn. 402.

³ *Hodges' Case*, 87 Cal. 162.

⁴ Thorold Rogers, *Economic Interpretation of History*, 25.

⁵ See Weedon's *Economic & Social History of New England*.

⁶ *Mobile v. Yuille*, 3 Ala. 137. See also *Shelton v. Mobile*, 30 Ala. 540. See *Dunham v. Rochester*, 5 Cowen, 462.

⁷ T. H. Farrer, *The State in its Relation to Trade*, ch. viii.

§ 17. If it can be shown that an unrestricted freedom of contract results in detriment to the rights of the public, the supremacy of the latter may be asserted by restricting the private right. There is a complaint which has received much legislative attention in recent years. The complaint is substantially this; that corporations and individuals engaged in affording certain facilities to commerce, charge unreasonable rates for services. These rates the customer is in many cases obliged to pay or forego facilities essential to his business, because the services are either such as cannot be well performed by individuals, or can, in fact, be rendered only by those actually tendering them, owing to the absence of competition, and the practical difficulties in the way of its institution. In other words, it is charged that those occupying a commanding position impose exorbitant rates for service. The parties against whom these complaints are directed may be divided into two classes, — one consisting of corporations invested with certain public powers, notably the right of eminent domain; the other comprising associations enjoying simply a corporate franchise and individuals. If the legislature grant a charter, and prescribe fixed rates for service, or leave the exclusive making of rates to the company, there is a contract which cannot be impaired without compensation.¹ But the charter privilege of a company, "from time to time to fix, regulate, and receive the tolls and charges by them, to be received for transportation," is not such a contract.² If the legislature does not make a contract, it may limit the charges for services to a reasonable rate.³

§ 18. Thus far the corporations subjected to state supervision in the matter of charges are such as have received state aid in the form of special powers. It has been further held that the undertakers of certain enterprises which have no direct connection with the state unless, it may be, through the acceptance of an ordinary corporate franchise, are presumed, from the very nature of the enterprise, to so dedicate their property to the use of the public that the state may regulate their charges for service.⁴

¹ See *Chicago, B. & Q. R. v. Iowa*, 94 U. S. 155. U. S. 164 (The Granger Cases); *Spring Valley Water Works Co. v. Schottler*,

² *Stone v. Farmer's Loan & Trust Co.*, 116 U. S. 307. 110 U. S. 347; *Georgia R. v. Smith*, 128 U. S. 174.

³ *Peik v. Chicago & N. W. R.* 94 U. S. 113; ⁴ *Munn v. Illinois*, 94 U. S. 113;

The enterprises are said to be "affected with a public interest,"—a description borrowed from Hale's *De Portibus Maris*.¹ In the leading case of *Munn v. Illinois*,² the plaintiff was the owner of a grain elevator. The legislature passed an act requiring the owners of such elevators to perform services at rates not to exceed a fixed maximum. The constitutionality of the act was questioned on the ground that the elevator was private property devoted to private uses, and hence beyond the asserted power of regulation. The United States Supreme Court, affirming the judgment of the State court,³ declared the act constitutional.

The doctrine of *Munn v. Illinois*,⁴ affirmed in *People v. Budd*,⁵ must be accepted, of course, as an authoritative definition of state power. The doctrine has been much criticised, and although the enunciation of a new doctrine, or the novel application of an old one is entitled to equal respect with the reiteration of familiar law, it is permissible to examine it critically in order to determine its actual bearing on the rights of property. This examination is undertaken the more readily, because one of the justices who took part in the decision of *Munn v. Illinois* has lately declared,⁶ that it has been overruled in an important particular.⁷ It may be noted in passing that in the case just cited, but three justices who were of the court in the *Munn* case took part. Of the majority in the *Munn* case, Justice Bradley here dissented, while Justice Miller approved the result in a separate opinion, and Justice Field, of the minority in the earlier case, is here with the majority. Furthermore, Justice Miller has made, in *Wabash, St. Louis & Pacific Railroad Co. v. Illinois*,⁸ an important commentary on the *Munn* case, for he assumes that the elevator in question was one to which the public had a right to resort. But this point did not clearly appear in the opinion of the Supreme Court, nor in that of the State court, nor yet in the statute which provoked the litigation.⁹ Now if an obligation to

People v. Budd, 117 N. Y. 1; s. c. 143 U. S. 517.

¹ 1 Hargrave's Tracts, 78.

² 94 U. S. 113.

³ 69 Ill. 80.

⁴ 94 U. S. 113.

⁵ 117 N. Y. 1; s. c. 143 U. S. 517.

⁶ See Justice Bradley's dissenting opinion, in *Chicago, M. & S. P. R. v. Minnesota*, 134 U. S. 418.

⁷ See § 23.

⁸ 118 U. S. 557.

⁹ See *People v. Budd*, 117 N. Y. 1, 55, Peckham, J.

serve is evidenced by the act of the state in fixing rates, we get this proposition — A person engaging in a certain business, say the storing and shipping of grain, is presumed to dedicate his property to the public in these respects; his rates are to be reasonable, and his reception of customers is to be limited only by the capacity of his plant. The motive of an actual dedication is readily understood. An actual dedication is made in view of an anticipated benefit to other property of the donor, or it is in the nature of a gift. In such cases a consideration is either anticipated, or waived. Should not a presumed dedication be offset by a presumed consideration, in order to avoid the assumption of a parting with property without compensation?

It does not appear that the simple undertaking of the business in question involves its dedication to the public use, so that the public have, without more, the right to facilities at reasonable rates. The state must expressly compel the undertaker to submit to control in the matter of service. Thus, the mere fact that one is engaged in a business which the state may regulate, but has not, does not constrain him to charge equal and reasonable rates to all comers, nor will the granting of a charter for the carrying on of the business in question evince the intention of the legislature to regulate charges.¹

§ 19. In *Munn v. Illinois*,² it is said that it has been customary in this country to regulate common carriers, bakers, millers, wharfingers, and innkeepers, and in so doing to fix a maximum rate for services rendered. Common carriers are presumed to serve at reasonable rates such as choose to employ them,³ and have been said to be in the exercise of "a sort of public office," and to have "public duties to perform."⁴ Innkeepers are obliged by the common law to furnish accommodation for travellers without invidious discrimination.⁵ This

¹ *Delaware L. & W. R. v. Central Stock Yard Co.*, 45 N. J. Eq. 50; *Ladd v. Cotton Press Man. Co.*, 53 Tex. 172; *Live Stock Comm. Co. v. Live Stock Exch.* 143 Ill. 210. See also *Weale v. West Middlesex Water Works*, 1 Jac. & Walk. 358; *Hoddesdon Gas Co. v. Haslewood*, 6 C. B. N. s. 239; *O'Neill v. Annett*, 27 N. J. L. 290.

² 94 U. S. 113.

³ *Allen v. Sackrider*, 37 N. Y. 341. See also *Dwight v. Brewster*, 1 Pick. 50.

⁴ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

⁵ *Jackson v. Rogers*, 2 Show. 327; *People v. King*, 110 N. Y. 418.

obligation has been placed upon the ground that innkeepers are "a sort of public servant, they having . . . a kind of privilege of entertaining travellers,"¹ and also upon the broader ground that it is to the public interest "that travellers shall not while upon their journey be deprived of necessary food and lodging."² But the state has not prescribed rates for board and lodging. It seems that the miller has not been compelled, in this country, to serve all comers at reasonable rates, unless he has been given the right to condemn the site or power for his mill.³ It will be seen that thus far the state has compelled service and fixed the price thereof only in businesses the undertakers of which either enjoy a peculiar franchise, or make some special or habitual use of public property.

§ 20. The plaintiff in *Munn v. Illinois*,⁴ does not appear to have received any special privilege from the state. But his property was said to be affected with a public interest,⁵ and therefore subject to regulation. It was also said in the *Munn* case, that the business of handling grain in transit through Chicago was a monopoly in fact, if not in law, — a virtual monopoly, and hence subject to regulation. By "virtual monopoly," which seems to have been first used in this connection in *Allnutt v. Inglis*,⁶ we are to understand a monopoly due to circumstances, as distinguished from one created by law. The judgment of Lord Ellenborough in *Allnutt v. Inglis*, which has

¹ *Rex v. Ivens*, 7 C. & P. 213.

² *Queen v. Rymer*, L. R. 2 Q. B. D. 136.

³ See § 424.

⁴ 94 U. S. 113.

⁵ Hale, *De Portibus Maris*, 1 Hargrave's Tracts, 77. "A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz.: makes the most of his his own. . . . If the King or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs

only licensed by the King, . . . or because there is no other wharf in that port, or it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate though settled by the King's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only, as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected with a public interest."

⁶ 12 East, 527.

been cited in our courts with some frequency, appears to deal with something like a legal monopoly, for the warehouse upon which was imposed the duty of receiving at reasonable rates was the only one in port licensed to receive certain goods. Lord Hale seems to have in view such a monopoly in the clause in the passage quoted, "because there is no other wharf in the port," although, as Judge Cooley suggests in his commentary on the whole passage, to maintain a wharf is to avail one's self of public property by license express or implied, the soil under navigable waters being in the crown.¹ But whatever be the true reading of Lord Hale's opinion, it seems unreasonable to hold that a virtual monopoly, which may well be a favorable business position due wholly to personal enterprise and foresight, can be subjected to regulation of charges because of that position.

§ 21. The power defined in *Munn v. Illinois* has been reaffirmed in the case of grain elevators,² and has been applied to railroads,³ waterworks,⁴ telephones,⁵ warehouses,⁶ and gasworks.⁷

It has been suggested, that the power asserted in *Munn v. Illinois* is sufficiently radical to warrant the state in laying hold upon any private business and regulating it.⁸ Some excuse for this assertion may be found, perhaps, in *dicta* unnecessarily broad, and in the stress laid upon the not quite satisfactory fiction of a presumed dedication to public use. But most of the decisions which follow the leading case are, in point of fact, either more or less closely directed to the public interest in facilitating the transfer of commodities from the producer to the consumer,

¹ Const. Lim. 6th ed. 738.

² *Budd v. New York*, 143 U. S. 517; s. c. 117 N. Y. 1.

³ *Peik v. Chicago & N. W. R.*, 94 U. S. 164; *Dow v. Beidleman*, 125 U. S. 680; *Georgia B. R. & B. Co. v. Smith*, 128 U. S. 174. See also *Wabash, S. L. & P. R. v. Illinois*, 105 Ill. 236.

⁴ *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

⁵ *Cent. Union Tel. Co. v. State*, 118 Ind. 194; *Webster v. Nebraska Tel. Co.*, 17 Neb. 126; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399.

⁶ *Nash v. Page*, 80 Ky. 539. See *Girard Storage Co. v. Southwark Co.*, 105 Pa. 248.

⁷ *Zanesville v. Gas Light Co.*, 47 Ohio St. 1.

⁸ See *Stone v. Wisconsin*, 94 U. S. 181, dissenting opinion of Justice Field; Dicey, *Law of the Const.* 150; Hare, *Const. Law*, 771; Address of Hon. George Hoadley, *Jour. Social Science*, No. 28; "The Dartmouth College Case and Private Corporations," by William P. Wells, Esq., 9 Am. Bar Ass'n Rep. 229; Bryce, *American Commonwealth*, i. 267.

or else relate to callings which the state has been long accustomed to regulate. Moreover, it is to be noted that in most of the cases governed by *Munn v. Illinois*,¹ the services in question are invariable in character. The manner of their performance is not regulated by the taste or financial ability of the customer. A hundred bushels of wheat and a thousand are handled in the same way. There is but one way of sending a message by telephone. Now there is a practical obstacle to the limitation of charges for services which vary according to the taste and means of the customer. For example, if the state should, in the interest of travellers, fix a maximum rate for hotel accommodations, a rate which would enable the well-to-do to obtain the accommodation to which their means entitle them would not afford protection to the poor traveller. There seems to be no present warrant for extending the doctrine of *Munn v. Illinois* to the common avocations of life, — to assume that the shoemaker and the tailor dedicate their business to the public use. Nor will a dedication to public use be inferred simply from the extent and importance of the business in question.² Thus, it has been held that the mining of coal is not affected with a public interest.³

§ 22. Where the legislature may prescribe rates for service, the reasonableness of the rate is generally a legislative, not a judicial question.⁴ But as the legislature cannot take private property for public use without compensation, nor deprive one of property without due process of law, it follows that where legislative action will effect such a taking or deprivation the courts may intervene. Thus, a statute which imposed such rates for transportation as would reduce the gross income of the corporation below the cost of operation and repair was set aside as an act of spoliation, an attempt to compel the corporation to submit to the use of its property by the public without compensation.⁵ A statute prescribed that railroad companies should present their schedules of rates to commissioners, who were

¹ 94 U. S. 113.

State v. Loomis, 22 S. W. Rep. 350 (Mo.

² See *Live Stock Comm. Co. v. Live Stock Exch.* 143 Ill. 210; *Ladd v. Cotton* 1893).

⁴ *Munn v. Illinois*, 94 U. S. 113.

Press Man. Co., 53 Tex. 172.

⁵ *Commonwealth v. Covington*

³ *Millett v. People*, 117 Ill. 294. See *Bridge*, 21 S. W. Rep. 1042 (Ky. 1893).

empowered to determine the proper rate without giving the companies an opportunity to be heard. The act was declared unconstitutional as an attempt to deprive the companies of property without due process of law.¹

§ 23. In reviewing the salient features of the police power over property, there appears this fundamental distinction between it and the right of eminent domain. The police power is exerted without compensation. This is so because the existence or unrestrained use of the property affected is positively inimical to the public interest. On the other hand, the relation of the property to the public welfare is, in the case of the eminent domain, usually a matter of indifference. The property is generally taken because of its utility to the state. Without discussing here the difficult subject—a taking of property—it may be said broadly, that through the right of eminent domain the state gains by the acquisition of property, through the police power by the destruction or regulation of property.²

But it is sometimes necessary to supplement, or more accurately, to supersede the police power by the eminent domain. This must be done when the public health or safety demand the appropriation of property neither essentially harmful nor worthless.³ Hence, a dam, lawfully erected, cannot be abated by the police power because it causes a nuisance, but must be condemned.⁴ If it should be deemed advisable to kill healthy animals within a district overrun by pleuro-pneumonia in order to surely prevent the spread of the disease, their value should be paid.⁵

Taxation.

§ 24. There is a marked distinction between ordinary taxation and the right of eminent domain.⁶ By each power a forced

¹ *Chicago, M. & S. P. R. v. Minnesota*, 134 U. S. 418.

² See *Philadelphia v. Scott*, 81 Pa. 80.

³ *Cheesebrough's Case*, 78 N. Y. 232. See §§ 426–429.

⁴ See *Miller v. Craig*, 11 N. J. Eq. 175. Compare *People v. Board of Health*, 140 N. Y. 1.

⁵ See *Miller v. Horton*, 152 Mass. 540.

⁶ *People v. Brooklyn*, 4 N. Y. 419; *Genet v. Brooklyn*, 99 N. Y. 306; *Booth v. Woodbury*, 32 Conn. 118; *Emery v. San Francisco*, 28 Cal. 345; *Sharpless v. Philadelphia*, 21 Pa. 147; *Gilman v. Sheboygan*, 2 Black, 510.

contribution is exacted for the public good, but taxation exacts the money which is supposed to represent the contributor's share of the public expense, while the eminent domain exacts specific property for specific uses. The contribution is in each case offset by compensation, but the compensation due to him whose property is taxed is usually paid in the preservation of social order, or in benefits more or less widely diffused; the compensation due upon the exercise of the eminent domain is usually paid in cash. Sometimes, however, a statute pretending to impose a tax is set aside on the ground that its enforcement would violate the principle of the eminent domain, by taking property for private use, or for public use without compensation.¹ The extension of municipal boundaries, with the result of a heavier incidence of taxation upon the property embraced, has been sometimes attacked on the ground that there is a taking of property without compensation. The courts have usually refused to restrain the legislative discretion in such case;² but there may be cases, perhaps, where the extension is so obviously desired for the sake of revenue without regard to benefit, that it should be restrained.³ When the avails of a tax levy are plainly intended to benefit a private enterprise the statute will be set aside as attempting to take property for private use;⁴ and, for a like reason, a statute was set aside which pledged the credit of a municipality to aid in rebuilding houses destroyed by fire.⁵ In *Sears v. Cottrell*,⁶ Judge Campbell urged, in a dissenting opinion, that under a statute authorizing distress and sale of goods for payment of taxes, the property of a mortgagor in possession of the mortgagee could not be sold without taking property for private use,—the goods of A to pay the debt of B. This point was raised but dismissed in *Hersee v. Porter*.⁷

§ 25. Where a local improvement is undertaken, a street for example, the cost in whole or in part is frequently de-

¹ *Livingstone v. Paducah*, 80 Ky. 656.

² *Morris v. Waco*, 57 Tex. 635; *Giboney v. Cape Girardeau*, 58 Mo. 141.

³ See *Cheaney v. Hooser*, 9 B. Mon. 330; *Smith v. Sherry*, 50 Wis. 210.

⁴ *Loan Ass'n v. Topeka*, 20 Wall. 655; *Cole v. La Grange*, 113 U. S. 1; *Weis-*

mer v. Village of Douglas, 64 N. Y. 91;

Allen v. Jay, 60 Me. 124; *Scuffletown Fence Co. v. McAllister*, 12 Bush, 312;

Coates v. Campbell, 37 Minn. 498.

⁵ *Lowell v. Boston*, 111 Mass. 454.

⁶ 5 Mich. 251.

⁷ 100 N. Y. 403.

frayed by an assessment on property benefited. Such assessments have been contested upon the ground that they effect a taking of property for public use without compensation. If they were to be judged by the principles of the eminent domain they might often fail of justification, for the compensation due on condemnation is money, or at least such money compensation as may be assessed after considering benefits to the tract affected,¹ but the compensation for a special assessment is wholly in benefits, which may or may not relate to the land condemned. The prevailing opinion is that such an assessment is a tax of a peculiar nature, a local imposition in aid of a work of such special advantage to particular property, as to justify the burdening of that property with so much of the cost as will offset the advantage.² But if it appears that a special assessment is in excess of the benefits conferred by the improvement, it may be set aside as a taking of property without compensation, or for the direct benefit of those persons who would be relieved from the payment of their just proportion by the overweighting of the property in question.³ It has been said that the only theory upon which special assessments can be based, is "that if local improvements can be conveniently paid for in this way, in the long run the general public may be charged with the general result with approximate equality."⁴

Regulation of Private Property.

§ 26. Other manifestations of sovereign power over property are expressed in statutes which change rules in respect to the acquisition, tenure, and devolution of private property, or impose burdens on its ownership in the interest of other property. Such statutes are in one sense private, in that they directly affect private interests only, but they are in the highest sense public, as

¹ See § 225.

² *People v. Brooklyn*, 4 N. Y. 419; *Washington Ave.*, 69 Pa. 352; *Hessler v. Drainage Comm.*, 53 Ill. 105; *Scoville v. Cleveland*, 1 Ohio St. 126; *Nichols v. Bridgeport*, 23 Conn. 189; *Howell v. Essex Road B'd*, 32 N. J. Eq. 672; *Hayden v. Atlanta*, 70 Ga. 817.

³ See *Stuart v. Palmer*, 74 N. Y. 183;

Lee v. Ruggles, 62 Ill. 427; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *Barnes v. Dyer*, 56 Vt. 469. Compare *Kingman, Petitioner*, 153 Mass. 566.

⁴ *Detroit v. Daly*, 68 Mich. 503.

they express the interest of the body of the people in laws which are intended to secure uniform and just protection to each member. Some of these statutes have been assailed as effecting a taking of the property of one person in order to give it to another. If this criticism is well founded the statute is invalid. The state may transfer the property of A to itself or its agents for the public use, but the state cannot transfer it to B,¹ or give him dominion over it.² It follows that while common law and statutory rules which relate to property may be changed by the legislature, the new statute is inoperative so far as vested interests are concerned.³ Thus where there is an estate in vested remainder a statute permitting the possessor of the supporting estate to sell the land without the consent of the remainder-man will not be sustained.⁴ If dower be assigned, the legislature cannot empower the owner of the fee to take the dower interest, and substitute a bond conditioned for the payment of its yearly value.⁵ It seems that a statute authorizing the administration of the property of one absent and unheard of for three years as if he were dead, and enabling creditors to make final settlement with the administrators, may be void as to a living person.⁶ Estates which have not vested may be dealt with at pleasure. Thus, the incident of survivorship in existing estates may be abolished, as it is a mere contingency.⁷ But it has been said that a contingent estate in expectancy cannot be extinguished without consent.⁸ Statutes permitting the partition of estates in common do not divest property. They simply allow it to be apportioned.⁹

§ 27. In most of the cases noted under this head, the statutes are evidently directed to private ends, but the same regard for pri-

¹ See *Van Horne's Lessee v. Dorrance*, 2 Dall. 304; *Wilkinson v. Leland*, 2 Pet. 627; *Quimby v. Hazen*, 54 Vt. 132; *Varick v. Smith*, 5 Paige, 137; *Helm v. Webster*, 85 Ill. 116.

also *Schafer v. Euen*, 54 Pa. 304; *Maxwell v. Goetschius*, 40 N. J. L. 383.
⁵ *Talbot v. Talbot*, 14 R. I. 57.
⁶ *Lavin v. Savings Bank*, 18 Blatch. 1.

⁷ *Bambaugh v. Bambaugh*, 11 S. & R. 191. See also *Burghardt v. Turner*, 12 Pick. 534.

⁸ *Brevoort v. Grace*, 53 N. Y. 245. See *Bass v. Roanoke Nav. Co.*, 111 N. C. 439.

⁹ *Richardson v. Munson*, 23 Conn. 94.
² See *Morse v. Stocker*, 1 Allen, 150.
³ *Burke v. Savings Bank*, 12 R. I. 513; *Stratton v. Morris*, 89 Tenn. 497; *Culbertson v. Coleman*, 47 Wis. 193.
⁴ *Powers v. Bergen*, 6 N. Y. 358; *Ervine's Appeal*, 16 Pa. 256; *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483. See

vate rights is maintained where the state aims at a vested right under cover of an apparent public interest. In *Palairé's Appeal*,¹ the legislature declared that the existence of irredeemable ground rents was against the policy of the state, which was to encourage the free transfer of land, and that such rents should be extinguished with due regard for private rights. The court held that the act was unconstitutional, as it would forcibly convert a vested estate into its money equivalent for a private purpose.

Statutes called betterment acts, which declare that an occupant of land who has made improvements thereon in good faith, cannot be ejected until he has been paid the excess in value of the improvements over the value of the use and occupation, change the rule of the common law, but do not divest any right of property.² But it has been said that betterments cannot be considered when possession has been taken under defective eminent domain proceedings, for the expropriator is bound to see that the proceedings are regular.³

Land may be so situated that its full utility can be obtained only by improvements which necessarily benefit the land adjoining. The state has, in some cases, recognized the justice of apportioning the cost of such improvements between the owners of the tracts in question. Statutes apportioning the cost of party walls and fences are the most common examples of such legislation, and it has been held that one may be authorized to set one half of a party wall upon his neighbor's land.⁴ A statute has been sustained, which provides that one who by draining his own land necessarily rids mineral lands of water so that they become workable, shall be entitled to a certain percentage of the ore mined.⁵

¹ *Griswold v. Bragg*, 48 Conn. 577; *Hunt v. Ambruster*, 17 N. J. Eq. 208. *Stump v. Hornback*, 94 Mo. 26; *Ross v. Irving*, 14 Ill. 171. But see *Wilkins v. Jewett*, 139 Mass. 29; *Traute v. White*, 46 N. J. Eq. 437.

² *Harris v. Marblehead*, 10 Gray, 40.

⁴ *Ahern v. Dubuque Min. Co.*, 48

³ *Evans v. Jayne*, 23 Pa. 34; *Corcoran v. Nailor*, 6 Mackey (D. C.) 580;

Iowa, 140.

CHAPTER II.

JURISDICTION.

§ 28. The right of eminent domain can be exercised only within the jurisdictional limits of the state. These limits are usually territorial. They may be defined by subjects, however. This condition may exist in the United States, where property in the States is subject to a dual sovereignty, local and federal, each supreme within its sphere, and each having an eminent domain commensurate with its necessities.¹

It is, of course, inconceivable that a sovereign should contemplate the direct expropriation of property within a foreign state. Such action would be clearly unwarrantable.² But a question of practical importance is presented, where the construction of public works in one state causes a consequential injury within the actionable degree to property in another. It has been urged indeed that the status of the several States of the Union is such, that a servitude cannot exist in one for the benefit of property in another; for example, that a lower proprietor on a river cannot object to the diversion of its waters in another State. This assertion is without foundation.³ It appears that a State cannot authorize such a use of an interstate river as will destroy a fishery,⁴ or obstruct navigation,⁵ in another State. Further, as a State must recognize extra-territorial servitudes, so it cannot create such a servitude in the interests of its own works. A State cannot

¹ See *Trombley v. Humphrey*, 23 Mich. 471.

² See *Crosby v. Hanover*, 36 N. H. 404; *Farnum v. Blackstone Canal Co.*, 1 Sumn. 46; *Bank of Augusta v. Earle*, 13 Pet. 519; *State v. Boston, C. & M. R.* 25 Vt. 433; *Saunders v. Bluefield Water Works*, 58 Fed. Rep. 133.

³ *Manville Co. v. Worcester*, 138 Mass. 89. See also *Foot v. Edwards*, 3 Blatch. 310; *Thayer v. Brooks*, 17 Ohio, 489.

⁴ See *Holyoke Co. v. Lyman*, 15 Wall. 500.

⁵ See *Palmer v. Cuyahoga Co.*, 3 McLean, 226.

injuriously affect property beyond its borders, any more than it can expropriate it. Hence, where land is flooded by reason of the construction of works in another State, the statutes of the latter cannot be pleaded in justification.¹ In *Rundle v. Delaware & Raritan Canal Co.*² the plaintiff claimed damages on account of an injury to his mill in Pennsylvania caused by the diversion of the waters of the Delaware by the defendant, a New Jersey corporation. The court waived the question as to the right of either of these States to divert the water of an interstate river without the consent of the other, and decided that, as the plaintiff's license to use the water was subject, according to the law of Pennsylvania, to a public right to divert it, he was bound by that law.

The liability for injuries beyond the jurisdiction being defined, the question remains as to the method and extent of redress. Now it is clear that the promoters of an undertaking which causes damage in another State cannot have compensation assessed under the laws of the latter.³ It seems equally clear, that there is no injustice in permitting the person injured to apply for compensation under the foreign statute authorizing the work.⁴ But he cannot be compelled to recognize the permanence of the injury by applying for statutory compensation, but may have his action in tort,⁵ or, if the circumstances warrant, an injunction.⁶

§ 29. The eminent domain inheres in the state for domestic uses only. It cannot be exerted to further the public uses of a foreign state.⁷ It should be noted that this proposition does not cover the case of a foreign corporation doing business within the state,⁸ nor that of a domestic corporation the stock of which is

¹ *United States v. Ames*, 1 Wood. & M. 76; *Rutz v. St. Louis*, 7 Fed. Rep. 438; *Holyoke Water Power Co. v. Conn. River Co.*, 52 Conn. 570.

² 14 How. 80.

³ *Salisbury Mills v. Forsaith*, 57 N. H. 124; *Worcester v. Gt. Falls Man. Co.* 39 Me. 246.

⁴ *Banigan v. Worcester*, 30 Fed. Rep. 392.

⁵ See *Foot v. Edwards*, 3 Blatch. 310.

⁶ *Stillman v. White Rock Man. Co.*, 3 Wood. & M. 539; *Holyoke Water Power Co. v. Conn. River Co.*, 52 Conn. 570; s. c. 22 Blatch. 131; *Farnum v. Blackstone Canal Co.*, 1 Sumn. 46. See also *Burk v. Simonson*, 104 Ind. 173.

⁷ *Kohl v. United States*, 91 U. S. 367.

⁸ See § 106.

held abroad.¹ Nor is it generally held that a federal use is so foreign as to prevent a State from furthering it by its right of eminent domain.² Further, there is authority for the statement that an undertaking may be beyond the borders of a State, and yet be of such domestic concern as to warrant the exercise of the right of eminent domain in its behalf. Thus, the State of New York granted to the Morris Canal Company, a corporation operating a canal wholly within the State of New Jersey, the power to condemn a water supply. The grant was upheld on the ground that the canal was a public benefit to the former State, as it afforded a waterway for the transportation of coal from Pennsylvania to the port of New York.³ In *Farnum v. Blackstone Canal Company*,⁴ the defendants, whose canal ran through Rhode Island and Massachusetts, built a dam within the former State which caused the flooding of the plaintiff's land in the latter. The company admitted that the Rhode Island statute under which they acted could not confer the right to flood land in Massachusetts, but asserted that the corporations authorized to build the canal to the borders of their respective States, were so united as to form a single corporation. Justice Story found no merger of corporate identities, but simply a union of interests and stocks, and, without expressing an opinion as to the rights of a single corporation in such case, granted an injunction. The point raised in this case suggests the question, whether an undertaking considered as a whole may not be a public use common to two States, so that joint and interdependent grants of the eminent domain may cure deficiencies incident to independent grants.

EMINENT DOMAIN OF THE UNITED STATES.

§ 30. It is said that "lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it."⁵

¹ *Amoskeag Co. v. Worcester*, 60 N. H. 522.

² See § 33.

³ *Townsend's Case*, 39 N. Y. 171.

⁴ 1 Sumn. 46.

⁵ *Cherokee Nation v. Kansas R.*, 135 U. S. 641.

The United States have the right of eminent domain over the District of Columbia, the Territories, and such land within the States as have been acquired through cession. They hold it by virtue of sovereignty, without regard to their title to the land. Thus, when it was urged that the United States could not exercise the right of eminent domain within the District of Columbia, because by the Maryland Act of Cession they were restrained from affecting private rights in the soil, the court declared that there was no assertion of a right of property in the soil, but a sovereign power over it.¹ The eminent domain of the United States over the District and Territories is, perhaps, Federal in theory, but not so in fact, for it may be used to further all the uses which are within the competency of the local sovereignty of the States. The powers of the territorial governments are derived immediately from the United States, whose local representatives they are.² The eminent domain is among these powers.³ Congress can authorize the condemnation of land within an Indian Reservation for an interstate railroad.⁴

§ 31. **Eminent Domain over Property within a State.** — The power of the United States to exercise their right of eminent domain within the States for federal purposes, seems to have been questioned in an early case,⁵ but has been since distinctly affirmed.⁶ It seems that land within a State which has been condemned by the United States is not thereupon withdrawn from the jurisdiction of the local law.⁷

Property within a State has been condemned for military purposes,⁸ post-offices,⁹ coast survey purposes and light-houses,¹⁰ a water supply,¹¹ and for navigation works.¹²

¹ *Chesapeake & O. Canal Co. v. Union Bank*, 4 Cranch, C. C. 75. See also *Shoemaker v. United States*, 147 U. S. 282.

² *National Bank v. County of Yankton*, 101 U. S. 129.

³ *Swan v. Williams*, 2 Mich. 427; *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Oury v. Goodwin*, 26 Pac. Rep. (Ariz.) 376. See *Pratt v. Brown*, 3 Wis. 603.

⁴ *Cherokee Nation v. Kansas R.*, 135 U. S. 641.

⁵ *Pollard's Lessee v. Hagan*, 3 How. 212.

⁶ *Kohl v. United States*, 91 U. S. 367; *Cherokee Nation v. Kansas R.*, 135 U. S. 641; *Hebbard's Case*, 4 Dill. C. C. 380; *Stockton v. Baltimore & N. Y. R.*, 32 Fed. Rep. 9.

⁷ *Barrett v. Palmer*, 135 N. Y. 336. ⁸ *United States v. Chicago*, 7 How. 185.

⁹ *Burt v. Ins. Co.*, 106 Mass. 356.

¹⁰ *Orr v. Quimby*, 54 N. H. 590; *Gilmer v. Lime Point*, 18 Cal. 229.

¹¹ *Reddall v. Bryan*, 14 Md. 444.

¹² See § 421.

§ 32. The power of Congress to regulate interstate commerce has been frequently construed in the courts, but not so as to definitely place undertakings which serve such commerce within the list of public uses calling for the federal eminent domain. Not until recently has the question been decided, whether Congress could authorize an interstate bridge despite the protest of a State. In *Stockton v. Baltimore and New York Railroad Company*,¹ the State of New Jersey formally asserted the right to prevent the erection of a bridge between New Jersey and New York, authorized by Congress. Although it was decided that the federal eminent domain was not involved, as no property was taken,² interstate bridges were placed on the list of works of federal purpose. The reasoning by which Justice Bradley arrived at this conclusion, appears to lead to the further one, which, indeed, this eminent jurist has suggested in another case,³ that the United States may exercise their eminent domain for an interstate railroad.⁴ This question has not been directly presented. The federal legislation behind the trans-continental lines perhaps asserts an ample authority, but is by no means a clear cut manifestation of the federal eminent domain, as the States through which the lines passed conferred all necessary powers for the execution of the works within their borders.⁵ Now the circumstance which necessitated the granting of the power to regulate commerce, was the disposition of the States to discriminate against each other in the matter of commerce, and to hamper the free course of commodities through the country. For many years and in many ways the courts have effectuated this power. They have maintained the freedom of waterways,⁶ and have nullified laws imposing a tax on the agencies of interstate commerce,⁷ or prohibiting the importation and sale, or the exportation of any commodity recognized by the United States as a legitimate subject of commerce.⁸

¹ 32 Fed. Rep. 9.

² See § 61.

³ *California v. Cent. Pacific R.*, 127 U. S. 1.

⁴ See also *St. Louis v. West. Union Tel. Co.*, 148 U. S. 92.

⁵ *Pacific R. Removal Cases*, 115 U. S. 1. See *Santa Clara County v. South. Pacific R.*, 118 U. S. 394.

⁶ *Gibbons v. Ogden*, 9 Wheat. 1; *Wheeling Bridge Co.*, 13 How. 518.

⁷ *Brown v. Maryland*, 12 Wheat. 419; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

⁸ *Leisy v. Hardin*, 135 U. S. 100 (*The Original Package Case*).

In the decisions cited, and in many others, there is simply the assertion of a power to prevent a State from impairing the freedom of commerce. It is evident that the assertion of federal power to build a railroad through States introduces a new question,—Does the right to regulate commerce include the power to create undertakings whereby commerce may be facilitated?

The question whether a State may grant the eminent domain to corporations distributing a commodity, such as natural gas, within its limits, and refuse the power to corporations desiring to export the commodity, without unlawfully hampering interstate commerce, has been mooted but not decided.¹

§ 33. It has been held, that when the United States desire to condemn property within a State for federal purposes, the State's eminent domain may be exerted in their behalf.² This course has been justified on the theory that the State in exercising its eminent domain for federal purposes, is ministering to a public use in the benefits of which its citizens share.³ In other States this method has been condemned, as a taking for the use of another sovereign.⁴ The latter view has been approved in *Kohl v. The United States*,⁵ where it is said, that the eminent domain is "a right belonging to sovereignty to take property for its own public uses, and not for those of another. Beyond this there is no necessity, which is alone the foundation of the right." In theory, the argument is all with the *dictum* in *Kohl v. The United States*. Practically, either course may be followed without prejudice. Since the decision in the *Kohl* case, the United States have availed themselves of the State's eminent domain in condemning land for works in aid of navigation,⁶ and the Supreme Court have decided that they may use State tribunals for the assessment of compensation.⁷

¹ *State v. Indiana, &c. Oil Co.*, 120 Ind. 575.

² *Burt v. Ins. Co.*, 106 Mass. 356; *United States v. Dumplin Island*, 1 Barb. 24; *Orr v. Quimby*, 54 N. H. 590.

³ *Petition of the United States*, 96 N. Y. 227; *Reddall v. Bryan*, 14 Md. 444. See also *Gilmer v. Lime Point*, 18 Cal. 229.

⁴ *Trombley v. Humphrey*, 23 Mich. 471; *Darlington v. United States*, 82 Pa. 382. See *Matter of League Island*, 1 Brewst. 524.

⁵ 91 U. S. 367.

⁶ *Petition of United States*, 96 N. Y. 227.

⁷ *United States v. Jones*, 109 U. S. 513.

A statute which provides that the federal eminent domain shall be exercised within a State according to the local law, does not oust the jurisdiction of the federal courts, but simply indicates the procedure which they shall adopt.¹

THE EMINENT DOMAIN OF THE STATES.

§ 34. The eminent domain is in each State by virtue of its statehood, whether that statehood be self-created, guaranteed by treaty, or confirmed by federal authority. New York, Texas, and Illinois hold the power in equal measure, and by the same tenure.² A statute allowing the condemnation of land for mining tramways contravened the declaration of the State Constitution as to publicity of use. It was urged that the statute was valid on the ground that the lawfulness of such use under the Territorial government affected land with an easement under federal law which the State courts could not disregard. The court asserted the supremacy of the State Constitution, and held that the statute was invalid.³

§ 35. **Effect of Federal Constitution upon State Eminent Domain.** — In several early State decisions, the eminent domain clause in the Fifth Amendment seems to have been considered a restraint on State action.⁴ This notion was dissipated, however, in *Barron v. Baltimore*,⁵ in which the clause was declared to refer to federal action only. Nor does the prohibition laid upon the States with regard to laws impairing the obligation of contracts, afford a basis for federal jurisdiction in matters of State eminent domain.⁶

§ 36. The Fourteenth Amendment contains explicit prohibitions upon State action. Among other prohibitions is this: "Nor shall any State deprive any person of . . . property without due process of law." Does this clause confer federal juris-

¹ *United States v. Engeman*, 45 Fed. Rep. 546. See *Secretary of the Treasury*, 45 Fed. Rep. 396.

² See *Pollard's Lessee v. Hagan*, 3 How. 212; *Huse v. Glover*, 119 U. S. 543; *Illinois Cent. R. v. Illinois*, 146 U. S. 387.

³ *People v. District Court*, 11 Col. 147.

⁴ See *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694.

⁵ 7 Pet. 243.

⁶ *Mills v. St. Clair County*, 8 How. 569; *Garrison v. New York*, 21 Wall. 196.

diction in case of a wrongful expropriation under State laws? If so, what are its limits? In *Davidson v. New Orleans*,¹ Justice Miller says that the clause does not refer to the eminent domain.² Justice Bradley, in his opinion in the same cause, takes the opposite view, which has received the approval of Justice Matthews.³ Now the clause insisting upon "due process of law" is found in the Federal, and most of the State Constitutions, standing with an eminent domain clause. Apparently these clauses refer to different things, and the fact that the latter was not incorporated in the Fourteenth Amendment led Justice Miller to express the opinion mentioned. Still, as one whose property is taken in defiance of the principles of the eminent domain seems to be deprived of it without due process of law, unless "due process" is satisfied by a certain adherence to form, without an adjudication of substantial rights, the question of federal jurisdiction is worth considering, though its positive definition is not warranted in the present state of the authorities. It is settled that there is due process of law in proceedings to condemn, although the property owner cannot demand a jury,⁴ nor appeal from the award of the tribunal.⁵ But the owner is entitled to notice of proceedings to condemn.⁶ It has been decided, that the question of the sufficiency of notice in assessment cases is appealable from the State to the federal courts,⁷ and it may be that the same question would be entertained in a case of condemnation. Further, it has been intimated that the Supreme Court will uphold the right to have compensation assessed by an impartial tribunal.⁸

§ 37. The obligations peculiar to the eminent domain are that property shall remain in the hands of its owner unless it is wanted for public use, and that, in that event, compensation shall be paid. These obligations obtain in every State, yet are by no

¹ 96 U. S. 97.

² See also *Eldridge v. Binghamton*, 120 N. Y. 309; *Wilson v. Baltimore & P. R.*, 5 Del. Ch. 524.

³ *Kentucky Railroad Tax Cases*, 115 U. S. 321. See also *Head v. Amoskeag Co.*, 113 U. S. 9; *Cole v. La Grange*, 113 U. S. 1; *Yesler v. Harbor Line Comm.* 146 U. S. 646; *Scott v. Toledo*, 36 Fed.

Rep. 385; *Mt. Hope Cemetery v. Boston*, 158 Mass. 509.

⁴ See § 316.

⁵ See § 356.

⁶ See § 333-336.

⁷ *Spencer v. Merchant*, 125 U. S. 345.

⁸ See *Davidson v. New Orleans*, 96 U. S. 97; *Head v. Amoskeag Co.*, 113 U. S. 9.

means construed uniformly. A use deemed public in one jurisdiction may be private in another. According to the principles of assessment in vogue in one State, a person whose property is condemned may receive a greater pecuniary indemnity than is given to one in similar case in another State. The rule has been laid down that when federal jurisdiction attaches because a right guaranteed by the Constitution is drawn in question, the Supreme Court interpret the law untrammelled by State decisions.¹ This rule seems to support the *dictum* in *Olcott v. Supervisors*,² that publicity of use in the matter of State taxation is a federal question, determinable, like a question of commercial law, without regard to local construction.³

The further question remains. Assuming that an eminent domain case is brought before a federal court, by what standard should the points be determined whether or not there is a *taking* of *property*? In *Pumpelly v. Green Bay Co.*,⁴ the flooding of land was said to be a *taking*. But the court said, with reference to the conflicting decisions as to the liability of public agents for consequential injuries, "When in the exercise of our duties here we shall be called upon to construe other State Constitutions we shall not be unmindful of the weight due to the decisions of those States."⁵ As far as the definition of "property" is concerned there is little difficulty. Each State is the maker and interpreter of its own rules concerning property. The federal courts must follow the State courts whenever they deal explicitly with the subject in question, no matter how peculiar the local rule may be,⁶ and must conform to reversals of previous State decisions.⁷ The most notable examples of obedience to this rule are the adjudications upon riparian rights, wherein the federal courts recognize a right of property in one State, and deny it in another.⁸

¹ *Ohio Life & Trust Co. v. Debolt*, 16 How. 432.

² 16 Wall. 678.

³ Compare *People v. Batchellor*, 53 N. Y. 128.

⁴ 13 Wall. 166.

⁵ See *Osborne v. Missouri Pac. R.*, 147 U. S. 248; *Hart v. Levee Comm.*, 54 Fed. Rep. 559. Compare *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 109.

⁶ *Rundle v. Delaware & R. Canal Co.*, 14 How. 80.

⁷ *Green v. Neal*, 6 Pet. 291; *Leffingwell v. Warner*, 2 Black 599. See *Olcott v. Supervisors*, 16 Wall. 678.

⁸ See *Yates v. Milwaukee*, 10 Wall. 497; *Barney v. Keokuk*, 94 U. S. 324.

§ 38. Condemnation proceedings are "suits at law" within the purview of the clause of the Federal Constitution authorizing the removal of causes from State to federal courts.¹ In *Boom Company v. Patterson*,² it was urged that the removal of a proceeding to condemn from a State to a federal court would be an unwarrantable interference with State eminent domain. The Supreme Court decided, however, that such a proceeding was essentially a civil suit, and therefore could be removed without invading State rights. A corporation having the right to remove cases to the federal courts cannot be compelled to surrender it in order to do business within a State, but, it seems, that if it voluntarily surrenders the right for good consideration a contract is created.³ It has been held that where a foreign corporation is forbidden to exercise the eminent domain within a State, its attempt to do so cannot be considered as a suit removable to the federal courts.⁴

Where a federal court acquires jurisdiction it may enjoin condemnation in an appropriate case.⁵ Although the effect of such action may be the stoppage of a work authorized by a State legislature, there is not an interference with State rights, at least where the court simply administers the local law.⁶

¹ *Union Pac. R. v. City of Kansas*, 115 U. S. 1; *Searl v. School Dist.*, 124 U. S. 197; *Banigan v. Worcester*, 30 Fed. Rep. 392; *Mt. Washington R. v. Coe*, 50 Fed. Rep. 637. See *Seattle & M. R. v. State*, 52 Fed. Rep. 594.

² 98 U. S. 403.

³ *Union Pac. R. v. Leavenworth, N. & S. R.*, 29 Fed. Rep. 728.

⁴ *Trester v. Missouri Pac. R.*, 23

Neb. 242. See also *Baltimore & O. R. v. Pittsburgh, W. & K. R.*, 17 W. Va. 812.

⁵ *North. Pac. R. v. Burlington & M. R.*, 4 Fed. Rep. 298.

⁶ See *Bonaparte v. Camden & A. R.*, Bald. C. C. 205. Compare *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 109; with *Hart v. Levee Comm.* 54 Fed. Rep. 559.

CHAPTER III.

THE PUBLIC USE.

§ 39. The usual constitutional declaration of the right of eminent domain is that private property shall not be taken for public "use," or "purpose," without compensation. It has been suggested that this declaration does not protect private property from being taken for private use without compensation,¹ or with compensation.² This construction is not approved. The words are construed to be words of limitation.³

In some States the main declaration is supplemented by a provision that private property may be condemned for certain uses which are seldom or never defined to be public.⁴ The legality of these private purposes cannot be gainsaid, as the people are competent to enact any law which does not violate the Constitution of the United States, or vested rights within their own State. But we do not approve the opinion,⁵ that the existence of these provisions confirms the view that, on principle, the eminent domain may be exerted to promote private uses. The definitions of the power which are approved both here and abroad, do not appear to justify this view. In our

¹ *Harvey v. Thomas*, 10 Watts, 63.

² See *Lewis, Eminent Domain*, preface.

³ *Kane v. Baltimore*, 15 Md. 240; *Sharpless v. Philadelphia*, 21 Pa. 147; *Robinson v. Swope*, 12 Bush, 21; *Concord R. v. Greely*, 17 N. H. 47; *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Wharton's Note*, 1 Am. L. Reg. n. s. 23.

⁴ "No private property can be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes in such manner as

may be provided by law." Constitution of Missouri, ii. 20. See also Illinois, iv. 31. "Private roads may be opened in the manner to be prescribed by law." New York, i. 7. See also Georgia, i. 3; Michigan, xviii. 14; South Carolina, i. 23. Land may be taken for "private ways of necessity . . . reservoirs, drains, flumes, or ditches on or across the land of others for agricultural, mining, milling, domestic, or sanitary purposes." Colorado, ii. 14. See also Idaho, i. 14; Montana, iii. 15; Washington, i. 16; Wyoming, i. 33.

⁵ *Lewis, Eminent Domain*, § 1, note.

opinion, the provisions in question evince the intention of the people to supplement the eminent domain because of its inadequacy to compass uses which they deem expedient. The uses themselves may be accurately described as constitutional uses. But whatever the scope of the eminent domain may be in theory, the courts of this country unite in declaring that private property shall not be taken except for public use.¹

There is no accepted formula by which publicity of use may be tested, but the volume of cases should afford sufficient data for an approximate definition. The following classification of public uses may seem to be somewhat arbitrary in certain cases, but what has appeared to be the most marked characteristic of an undertaking has been taken as the guide.

§ 40. **Federal and State Purposes.** — The purposes for which the United States may condemn property in order to execute their federal powers are sufficiently noted elsewhere.²

The purposes for which the United States, as a territorial sovereign, and the States may condemn, are, perhaps in theory, the same as those for which they grant the power to political or private agents. But in fact, the purposes which a government deems it expedient to promote by its own exertions are comparatively few. The government may condemn land for public buildings,³ a military camp,⁴ and a state reservation or park,⁵ and may deem it expedient to undertake itself a work usually prosecuted by an agent, such as a system of sewerage.⁶ It has been held, that the state cannot exercise the eminent domain to compass the purpose of taxation, — that it cannot take land for a canal, in order to derive a revenue from the sale of the water.⁷

¹ *Talbot v. Hudson*, 16 Gray, 417; *Gray*, 359; *Military Parade Ground*, 60 Concord R. v. Greely, 17 N. H. 47; N. Y. 319.

Sharpless v. Philadelphia, 21 Pa. 147; ⁵ See *State Reservation at Niagara*, *Scudder v. Trenton Del. Falls Co.*, 1 32 Hun, 537.

N. J. Eq. 694. See *Plum Creek Road*, ⁶ See *Kingman, Petitioner*, 153 110 Pa. 544. Mass. 566.

² See §§ 31, 32.

³ *Burt v. Ins. Co.*, 106 Mass. 356. ⁷ *Buckingham v. Smith*, 10 Ohio,

⁴ *Morris v. Comptroller*, 54 N. J. L. 288. See also *Cooper v. Williams*, 5

268. See also *Brigham v. Edmands*, 7 Ohio, 391.

§ 41. **Local Purposes.** — Property may be condemned for a public park,¹ an almshouse,² a market,³ a schoolhouse,⁴ a public bath,⁵ and a public urinal.⁶

There are undertakings which the state may promote through political agencies, but which it frequently permits private corporations to promote for the public use for a reasonable profit on their outlay. Among these are cemeteries,⁷ gas-works,⁸ and water-works.⁹

§ 42. **Highways.** — The laying out of highways by the eminent domain is the earliest and most widely diffused manifestation of the power. Indeed, it was customary at one time to lay them over unimproved lands without compensation.¹⁰ It is unnecessary to cite cases in support of the general proposition that a highway is a public use. It appears to be essential that it should connect with another highway.¹¹ But it is not necessary that it should be a thoroughfare. It may be a *cul de sac*, opening on a highway at one end only.¹² The terminus has no bearing on the publicity of a way. It may be a river,¹³ a state or township line,¹⁴ a church,¹⁵ or private property.¹⁶ An alley may be a public road.¹⁷

The condemnation of land for roads has been sometimes resisted on the ground that they are intended for the accom-

¹ Shoemaker v. United States, 147 U. S. 282; Holt v. Somerville, 127 Mass. 408; Board of Park Comm. v. Armstrong, 45 N. Y. 234. See § 173.

² Heyward v. New York, 7 N. Y. 314.

³ Henkel v. Detroit, 49 Mich. 249; Cooper's Case, 28 Hun, 515. See also Spaulding v. Lowell, 23 Pick. 71.

⁴ Williams v. School District, 33 Vt. 271; Long v. Fuller, 68 Pa. 170; Reed v. Acton, 117 Mass. 384; Board of Education v. Hackman, 48 Mo. 243. See also Searl v. School Dist., 124 U. S. 197.

⁵ Poillon v. Brooklyn, 101 N. Y. 132.

⁶ Badger v. Boston, 130 Mass. 170.

⁷ Edgecumbe v. Burlington, 46 Vt. 218; Balch v. County Comm., 103 Mass. 106; Henry v. Trustees, 48 Ohio St. 671. See also Cemetery Ass'n v. Redd, 33 W. Va. 262; Deansville Cemetery Ass'n, 66 N. Y. 569; Board of Health v. Van

Hoesen, 87 Mich. 533; Evergreen Cemetery Co. v. Beecher, 53 Conn. 551.

⁸ Bloomfield, &c. Gas Light Co. v. Richardson, 63 Barb. 437. See also Pittsburgh's Appeal, 123 Pa. 374; Providence Gas Co. v. Thurber, 2 R. I. 15.

⁹ See § 423.

¹⁰ See § 5, 226.

¹¹ See Waddell's Appeal, 84 Pa. 90; Niagara Falls & W. R., 108 N. Y. 375; Moore v. Roberts, 64 Wis. 538.

¹² People v. Kingman, 24 N. Y. 559; Schatz v. Pfeil, 56 Wis. 429; Peckham v. Lebanon, 39 Conn. 231.

¹³ Moore v. Auge, 125 Ind. 562.

¹⁴ Rince v. Rindge, 53 N. H. 530.

¹⁵ West Pikeland Road, 63 Pa. 471.

¹⁶ Goodwin v. Wethersfield, 43 Conn. 437; State v. Bishop, 39 N. J. L. 226; Sheaff v. People, 87 Ill. 189.

¹⁷ Savannah v. Hancock, 91 Mo. 54.

modation of tourists, or persons driving for pleasure. The courts have decided that where the roads are capable of general use, the special uses in question must be considered purely incidental.¹

The highway system is not necessarily completed by the opening of roads. In order to secure a complete system of communication, the state may exert the eminent domain in favor of bridges,² ferries,³ wharves,⁴ and the creation and improvement of waterways.⁵

While the undertakings mentioned are generally built and controlled by the public as free ways, they may be promoted by private corporations and persons to whom the eminent domain may be granted, upon the condition that the use shall be open to all upon reasonable terms.⁶ Thus land may be condemned for turnpikes,⁷ and toll bridges.⁸

§ 43. **Private Roads.** — Statutes authorizing the condemnation of land for what are called private roads, have provoked a decided conflict of opinion. Controversy is silenced, of course, where the governing Constitution has declared in favor of this use,⁹ so the subject will be considered on principle. The roads in question have been considered essentially public, because public policy dictates that every man shall have an outlet from his land to a highway, so that he may perform his duties to the state.¹⁰ But there is no gain to the state where one seeks to open a road from a tract of land to another tract on which he does not reside,¹¹ or from a tract already accessible.¹² In a recent decision the court approved a statute permitting one to gain an outlet over another's land, and said, "Here is a taking of prop-

¹ *Bryan v. Branford*, 50 Conn. 246; *Higginson v. Nahant*, 11 Allen, 530; *Mt. Washington Road*, 35 N. H. 134. ⁶ See § 418. ⁷ *State v. Maine*, 27 Conn. 641. See § 162.

² *Young v. Buckingham*, 5 Ohio, 485; *Towanda Bridge*, 91 Pa. 216. ⁸ *Arnold v. Covington & C. Bridge*, 1 Duv. 372.

³ *Day v. Stetson*, 8 Me. 365; *Stark v. McGowan*, 1 Nott & Mc. 387. ⁹ See § 39.

⁴ *Curran v. Louisville*, 83 Ky. 628; *Kingsland v. New York*, 110 N. Y. 569; *Matter of New York*, 135 N. Y. 253. See also *Jeffersonville v. Louisville & J. Ferry*, 27 Ind. 100; *Chicago Dock R. v. Garrity*, 115 Ill. 155. ¹⁰ *Johnson v. Supervisors*, 61 Ia. 89; *Brewer v. Bowman*, 9 Ga. 37. See also *Taylor v. Porter*, 4 Hill, 140, Nelson, J., dissenting.

¹¹ *Shake v. Fraser*, 21 S. W. Rep. 583 (Ky. 1893).

¹² *Richards v. Wolf*, 82 Ia. 358.

⁵ See § 418

erty for private use; an assumption that is *prima facie* unconstitutional, and can only be justified by the strictest necessity."¹ But the pleas of public policy and private necessity are disregarded in decisions which hold that a private road is a private use, and therefore that the compulsory acquisition of land for such a purpose is beyond the competency of the state.² In *Taylor v. Porter*,³ and in some of the cases following it, the road in question was not only private in inception, but private in use, — a way for the exclusive use of parties interested.⁴ In some States a road open to all who care to use it is considered a public road, although private persons condemn the necessary land, and construct and maintain the way at their own expense.⁵ But in *Bankhead v. Brown*,⁶ Judge Dillon decided that a road to be public must be not only open to all, but kept in repair at the public charge.⁷ A way simply connecting two tracts belonging to the same person is not such a private road as will warrant the condemnation of intervening land.⁸

§ 44. **Railroads.** — A railroad connecting with another railroad or public way, and serving as a common carrier of passengers and freight, is an undertaking of public purpose.⁹ At the institution of this means of transportation it was in some cases used as a sort of turnpike, all persons being allowed to use the rails with their own vehicles upon payment of toll.¹⁰ This use was abolished, when it became apparent that the full benefit of steam power could be obtained only by making railroad com-

¹ Plum Creek Road, 110 Pa. 544. See also *Allen v. Stevens*, 29 N. J. L. 509. See also *Private Road*, 112 Pa. 183.

² *Taylor v. Porter*, 4 Hill, 140; ⁶ 25 Ia. 540. *Rochester & G. H. R.*, 12 N. Y. Supp. 566; *Logan v. Stogsdale*, 123 Ind. 372; ⁷ See also *Proctor v. Andrews*, 42 N. H. 348; *Blackman v. Halves*, 72 Ind. 515. *Underwood v. Bailey*, 59 N. H. 480;

Sadler v. Langham, 34 Ala. 311; *Varner v. Martin*, 21 W. Va. 534; *Osborn v. Hart*, 24 Wis. 89; *Dickey v. Tennison*, 27 Mo. 373; *Nesbitt v. Trumbo*, 39 Ill. 110; *Witham v. Osborn*, 4 Or. 318. ⁸ *Robinson v. Swope*, 12 Bush, 21; *Klicker v. Guilband*, 47 N. J. L. 277. See also *Waddell's Appeal*, 84 Pa. 90.

⁹ *Secombe v. Railroad Co.*, 23 Wall. 108; *Cherokee Nation v. Kansas R.*, 135 U. S. 641; *Beekman v. Saratoga & S. R.*, 3 Paige, 45; *Bonaparte v. Camden & A. R.*, Bald. C. C. 205; *People v. Salem*, 20 Mich. 452.

⁴ See *Ayres v. Richards*, 38 Mich. 214.

⁵ *Ferris v. Bramble*, 5 Ohio St. 109; *Sherman v. Buick*, 32 Cal. 241; *Denham v. County Comm.*, 108 Mass. 302.

¹⁰ See *Lake Superior & M. R. v. United States*, 93 U. S. 442; *Commonwealth v. Fitchburg R.*, 12 Gray, 180.

panies masters of transportation as well as owners of roadbed. Although state railroads have not been unknown in the United States,¹ and are common in continental Europe, the railroad interests in this country are almost, if not quite, exclusively managed by private corporations. There are, however, some lines in which a State is a stockholder, and many more have been chartered upon the condition that the government may purchase them at a certain time, or upon a specified contingency.

The establishment of a trunk line is of public utility, and power may be given to consolidate connecting railroads by condemning the shares of unwilling stockholders.²

It has been held that a railroad may satisfy the condition of public utility though it is intended to carry only freight,³ or passengers.⁴ But a railroad not connected with a public way, and intended to carry tourists at certain seasons of the year, is not a public use.⁵ Manufacturing companies have occasionally attempted to condemn a right of way for a railroad to connect with a general railroad, in order to obtain a convenient outlet for their products. Such roads have been rightly defined to be private uses.⁶

§ 45. The efficiency of a railroad is not secured by the construction of the main roadbed. Therefore the state may authorize the condemnation of land for certain incidental uses. Land may be condemned for turnouts, side tracks, and switches;⁷ for passenger and freight stations,⁸ and the fact that the station is a union depot for several companies does not make it their private concern, for it is open to the public as an ordinary station;⁹ and for wharves from which freight may be delivered to vessels.¹⁰

¹ See *People v. Michigan South. R.*, 3 Mich. 496. *Ga.* 428; s. c. 75 *Ga.* 761; *Fanning v. Osborne*, 102 N. Y. 441; *London v. Sample Lumber Co.*, 91 Ala. 606.

² *Black v. Delaware & R. Canal*, 24 N. J. Eq. 455.

³ *Farnsworth v. Lime Rock R.*, 83 Me. 440; *Hibernia R. v. De Camp*, 47 N. J. L. 518; *Wiggins Ferry Co. v. East St. Louis R.*, 107 Ill. 450.

⁴ See §§ 402-404.

⁵ *Niagara Falls & W. R.*, 108 N. Y. 375.

⁶ *Split Rock Cable R.*, 128 N. Y. 408; *Weidenfeld v. Sugar Run R.*, 48 Fed. R. 615. See *Macon v. Harris*, 73

⁷ *New York Cent. & H. R. R.*, 77 N. Y. 248; *Philadelphia, W. & B. R. v. Williams*, 54 Pa. 103.

⁸ *Giesy v. Cincinnati, W. & Z. R.*, 4 Ohio St. 308; *New York Cent. & H. R. R.*, 77 N. Y. 248; *Hamilton v. Annapolis & E. R. R.*, 1 Md. 553; *State v. Railroad Comm.*, 56 Conn. 308.

⁹ *Union Depot Co. v. Morton*, 83 Mich. 265.

¹⁰ *N. Y. Cent. & H. R. R.*, 77 N. Y. 248.

It may be that an ordinary warehouse is not so necessary to the operation of a railroad as to warrant the condemnation of a site for it;¹ but a building for the proper handling of freight in transit is not, strictly speaking, a warehouse;² and it seems that a stockyard may be indispensable to a railroad company, which hold themselves out as common carriers of cattle.³

The incidental uses noted thus far are not merely necessary in a general way to the efficient operation of the railroad. They must be located in connection with the main line, and often at particular points. But the courts have been called upon to determine the propriety of condemnation to promote uses which are not essential to the passing use, and, in comparison with those just mentioned, sometimes savor of mere convenience rather than necessity.⁴ It has been held that land may be condemned for a place of deposit for waste earth,⁵ and also for repair shops,⁶ if a necessity exists in fact.⁷ The following uses have been deemed not sufficiently necessary to warrant the exercise of the eminent domain in their behalf; a car-factory,⁸ though in New York car-builders may connect their works with a railroad by laying a track over streets, upon terms similar to those imposed on street railway companies;⁹ a place for storing and shipping ice;¹⁰ a road between a station and a hotel erected for the entertainment of the patrons of the railroad.¹¹

§ 46. The question whether a railroad branching off from the main line is a public use, has provoked considerable discussion. Now there is no doubt but that a line connecting existing railroads is a public use;¹² and so is a branch line intended to afford

¹ *Cumberland Val. R. v. McLana-han*, 59 Pa. 23. Ill. 324; *Hannibal & S. J. R. v. Muder*, 49 Mo. 165.

² *New York Cent. & H. R. R.*, 77 N. Y. 248. See *Pennsylvania R. v. Jersey City*, 49 N. J. L. 540; *Erie County v. Erie & W. R.*, 87 Pa. 434.

³ *Covington Stock Yards Co. v. Keith*, 139 U. S. 128. ⁴ *See State v. Mansfield*, 23 N. J. L. 510.

⁵ *Lodge v. Philadelphia, W. & B. R.*, 8 Phila. 345. ⁶ *Chicago, B. & Q. R. v. Wilson*, 17 Ill. 123; *Low v. Galena & C. U. R.*, 18

⁷ *South. Pacific R. v. Raymond*, 53 Cal. 223. ⁸ *Eldridge v. Smith*, 34 Vt. 484. See also *New York & H. R. v. Kip*, 46 N. Y. 546.

⁹ Chap. 267, Laws of 1880. ¹⁰ *Rochester & G. R.*, 12 N. Y. Supp. 566.

¹¹ *Rochester & G. R.*, 12 N. Y. Supp. 566. ¹² *Union El. Ry.*, 113 N. Y. 275.

facilities to a particular district.¹ The real question in such cases is as to the charter power of the particular corporation.

A spur may be said to differ from a branch in this, that it affords facilities to a particular business or manufacturing concern, instead of to a section of country. The courts have denied the publicity of spurs in several cases;² for example, where the objective point is a brickyard,³ a tanyard,⁴ an iron-working establishment.⁵ On the other hand, a spur terminating at private property has been legitimated by the same reasoning that has been applied to a private road. It has been called a public use if all may use it.⁶ It has been decided that a spur to a grain elevator is a public use,⁷ and also a spur to a stockyard, the proprietors of which are under no obligation to receive cattle.⁸ The broad ground has been taken that a spur to a factory is a public use, in that it tends to develop the resources of the commonwealth.⁹

§ 47. **Works for the Development of Particular Natural Resources.** — In certain States, the development of great natural resources has seemed to the legislature and the courts a proper object of the eminent domain. To this end the power has been exerted for pipe lines for the conveyance of oil and natural gas,¹⁰ for logging booms open to all lumbermen using the stream, on payment of reasonable toll,¹¹ and for a flume for the transporta-

¹ See *Toledo, S. & M. R. v. East* See also *Chicago Dock R. v. Garrity*, 115 Ill. 155. But see *Mikesell v. Durkee*, 34 Kan. 509; s. c. 36 Kan. 97.

² See *Board of Health v. Van Hoesen*, 87 Mich. 533.

³ *Chicago & E. I. R. v. Wiltse*, 116 Ill. 449. See also *Rochester, H. & L. R.*, 110 N. Y. 119.

⁴ *Weidenfeld v. Sugar Run R.*, 48 Fed. R. 615.

⁵ *Pittsburgh, W. & K. R. v. Benwood Iron Works*, 31 W. Va. 710.

⁶ *Kettle River R. v. Eastern R.* 41 Minn. 461; *Chicago, B. & N. R. v. Porter*, 43 Minn. 527; *South Chicago R. v. Dix*, 109 Ill. 237. See also *Clarke v. Blackmar*, 47 N. Y. 150; *Phillips v. Watson*, 63 Iowa, 28.

⁷ *Clarke v. Blackmar*, 47 N. Y. 150; *Fisher v. Chicago & S. R.*, 104 Ill. 323.

⁸ *New York Cent. & H. R. R. v. Metropolitan Gas Light Co.*, 63 N. Y. 326.

⁹ *Getz's Appeal*, 10 W. N. C. (Pa.) 453; *Slocum's Appeal*, 12 W. N. C. (Pa.) 84.

¹⁰ *West Virginia Trans. Co. v. Volcanic Coal, &c. Co.*, 5 W. Va. 382; *Johnston v. Gas Co.*, 5 Cent. Rep. 564; *Carother's Appeal*, 118 Pa. 468.

¹¹ *Lawler v. Baring Boom Co.*, 56 Me. 443; *Schoff v. Imp. Co.*, 57 N. H. 110. See also *Boom Co. v. Patterson*, 98 U. S. 403; *Weaver v. Mississippi Boom Co.*, 28 Minn. 534; *Bennett's Branch Imp. Co's Appeal*, 65 Pa. 242.

tion of lumber.¹ Most of the law on this subject relates to the mining industry. In several States the courts have refused to permit the condemnation of property in order to facilitate the working of mines.² In other States the working of mines has been deemed of sufficient public utility to justify the condemnation of land for a mining canal;³ and it has even been held that a mine owner may condemn neighboring land for the purpose of sinking a shaft.⁴ In respect to the transportation of mine products, it is held that a mine owner cannot condemn land for a railroad to be used solely for the products of his own mine.⁵ But the mining interests have been deemed sufficiently important in some States to justify statutes enabling a mine owner to condemn a right of way for a railroad from his mine to the nearest available thoroughfare by rail or water. The railroad, frequently called a "lateral railroad," is to be open to all who may have occasion to use it.⁶ The same conclusion has been reached where the statute did not expressly provide that the road should be open to all, as the court held that this provision must be implied.⁷

§ 48. **Miscellaneous Purposes.**—Land may be condemned for a telegraph, or telephone line,⁸ but as these are usually built upon public roads the important question is whether there is a taking of private property.⁹ The right to condemn for works of navigation, irrigation, and reclamation, and for supplies of water for consumption and power, is considered in a later chapter.¹⁰ It

¹ Dalles Lumbering Co. v. Urquhart, 16 Or. 67.

² Consolidated Channel Co. v. Cent. Pacific R., 51 Cal. 269; Amador Queen Min. Co. v. Dewitt, 73 Cal. 482; Waddell's Appeal, 84 Pa. 90. See also Woodruff v. North Bloomfield, etc. Min. Co., 18 Fed. R. 753.

³ Hand Gold Min. Co. v. Parker, 59 Ga. 419.

⁴ Overman Silver Min. Co. v. Corcoran, 15 Nev. 147.

⁵ Stewart's Appeal, 56 Pa. 413; McCandless's Appeal, 70 Pa. 210; Sholl v. German Coal Co., 118 Ill. 427; State v. Railway Co., 40 Ohio St. 504. See also People v. Pittsburgh R., 53 Cal. 694.

⁶ Hays v. Risher, 32 Pa. 169; Hibernia R. v. De Camp, 47 N. J. L. 518; New Cent. Coal Co. v. Georges Creek Coal Co., 37 Md. 537. See also Colorado East. R. v. Union Pacific R., 41 Fed. R. 294; Bankhead v. Brown, 25 Ia. 540; Contra Costa R. v. Moss, 23 Cal. 323. See Edgewood R. Appeal, 79 Pa. 257.

⁷ Phillips v. Watson, 63 Ia. 28.

⁸ Lockie v. Mut. Union Tel. Co., 103 Ill. 401; Duke v. Cent. N. J. Tel. Co., 53 N. J. L. 341.

⁹ See § 407.

¹⁰ See Ch. xiv.

has been held that a corporation having for its purpose "the educating of the public by exhibiting artistic mechanical agricultural and horticultural products, and providing public instruction in the arts and sciences," may receive the eminent domain.¹

By whom is the Validity of the Purpose to be determined?

§ 49. Before determining the elements which make up a public use, the question suggests itself, — By whom is a "public use" to be determined? There are *dicta* allowing the widest range to legislative discretion in this matter. Chancellor Walworth intimated that the legislative judgment of the propriety of a particular use should not be questioned by the courts if by the use "the public interest could in any way be promoted."² But the possibilities of mischief in substituting the somewhat elastic "public interest" for the stricter "public use" were suggested in a later New York decision.³

The dignity and responsibility of the American judiciary as the conservers of constitutional guarantees are maintained in opinions which assert plainly that the lawfulness of the use is within the competency of the courts.⁴ These judgments have the merit of frankly stating the rule of action which governs the judiciary everywhere in passing upon statutes authorizing the condemnation of private property. The operation of the rule is by no means affected by the fact that the legislature has expressly declared that the purpose is public.⁵ In some States the power of the judiciary to determine publicity of use is expressly conferred by the Constitution.⁶

¹ Rees' Appeal, 12 Atl. Rep. 427. See Daggett v. Colgan, 92 Cal. 53; Gilman v. Milwaukee, 55 Wis. 328.

² Beekman v. Saratoga & S. R., 3 Paige, 45. See also Tide Water Co. v. Coster, 18 N. J. Eq. 518.

³ Bloodgood v. Mohawk & H. R., 18 Wend. 9, 61. See also Niagara Falls & W. R., 108 N. Y. 375.

⁴ Scudder v. Trenton Del. Falls Co., 1 N. J. Eq. 694; Tyler v. Beacher, 44 Vt. 648; Shoemaker v. United States, 147 U. S. 282; Deansville Cemetery Association, 66 N. Y. 569; Niagara Falls & W. R., 108 N. Y. 375; Sadler v. Langham, 34 Ala. 311; Talbot v. Hudson, 16 Gray, 417; Chicago & East. Illinois R. v. Wiltse, 116 Ill. 449. See also Hanson v. Vernon, 27 Ia. 28; Allen v. Jay, 60 Me. 124.

⁵ Waterloo Man. Co. v. Shanahan, 128 N. Y. 345; Savannah v. Hancock, 91 Mo. 54; Logan v. Stogsdale, 123 Ind. 372.

⁶ Colorado, xv. 8; Mississippi, iii. 17; Missouri, ii. 20; Washington, i. 16.

§ 50. It may be urged that the public purpose expressed in the statute is colorable in this that the would-be-expropriator intends to use it as a cloak for essentially private purposes. If this contention rests on assertion, without supporting proof in the documents or public actions of the corporation, the court should not forbid condemnation.¹ Hence a corporation complying with a general railroad law may condemn, notwithstanding that the whole of the capital stock is subscribed by persons who are officers of a corporation which, perhaps, could not accomplish its own ends by the eminent domain.² But if the evident purpose of the proposed undertaking is not within the purview of the statute condemnation will be restrained.³ Thus a city will not be permitted to widen a street for the purpose of granting the exclusive use of it to a railroad company.⁴

In passing upon the validity of a use the judiciary should consider its legal aspects only. The courts will not heed an allegation that the corporation may not fully perform its public duties.⁵ Whether the corporation will commence the undertaking or complete it, are practical questions not usually cognizable by the courts.⁶ So the court should not notice an allegation that the undertaking in question will not in fact accomplish the result intended.⁷ But while these propositions should be maintained generally, it may be well to reserve to the property-owner the right to resist condemnation in a case where the execution of the scheme proposed is so palpably impossible, on account of its physical or financial infirmities, as to render expropriation wholly vexatious. In *Kings Lynn v. Pemberton*,⁸ Lord Eldon thus referred to his opinion in the unreported case of *Agar v. Regent's Canal Company*: "Where

¹ *Brown v. Calumet River R.*, 125 Ill. 600; *Niemeyer v. Little Rock Junct. R.*, 43 Ark. 111. See also *State v. Kirgan*, 51 Ind. 142; *Matter of Buffalo*, 15 N. Y. Supp. 123.

² *National Docks R. v. Cent. R.*, 32 N. J. Eq. 755, reversing s. c. 31 N. J. Eq. 475.

³ *Niagara Falls & W. R.*, 108 N. Y. 375; *Forbes v. Delashmutt*, 68 Ia. 164. See also *Lynch v. Comm. of Sewers*, 32 Ch. D. 72.

⁴ *Ligare v. Chicago*, 139 Ill. 46.

⁵ *Lumbard v. Stearns*, 4 Cush. 60.

⁶ *Staten Island R. T. Co.*, 103 N. Y. 251; *Slingerland v. Newark*, 54 N. J. L. 62.

⁷ *Talbot v. Hudson*, 16 Gray, 417. See also *City of Kansas v. Baird*, 98 Mo. 215.

⁸ 1 Swan. 244.

persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the legislature has given the speculators the right to carry the canal can show that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this court will not permit the farther prosecution of the undertaking."¹

What is a Public Purpose?

§ 51. We are now in a position to determine the considerations which may be brought to bear upon the definition of a public purpose, and the characteristics of the purpose itself.

Certain points of difference between the eminent domain and taxation are noted elsewhere.² The question has been raised whether the public uses of taxation and of the eminent domain are so far similar that the state can tax for any use for which it may condemn, and *vice versa*. The power to levy a tax in aid of undertakings which can be promoted by the eminent domain seems to be implied in those decisions which approve taxation in favor of railroads operated by private corporations.³ Although this power has been so strenuously supported on principle that several States have found it necessary to destroy it by constitutional declaration, the writer is inclined to agree with those jurists who have not found the public uses of the eminent domain and taxation identical, and have protested against taxation in aid of a railroad.⁴ But there is no doubt that a tax cannot be levied in aid of a private manufacturing concern,⁵ although there are statutes which permit the compulsory acquisition of water-power for mills which are not open to the public.⁶ Nor does there seem to be any power to tax in favor of a private way.⁷ Judge Cooley has expressed the opinion that the public use of the right of eminent domain may be more liberally inter-

¹ See also *Lee v. Milner*, 2 Y. & C. 611. *v. Sheboygan R.*, 25 Wis. 167; *Dillon*

² See §§ 24, 25. *Mun. Corp.* 4th ed. § 153.

³ *Olcott v. Supervisors*, 16 Wall. 678. ⁵ See § 24.

⁴ *People v. Salem*, 20 Mich. 452; ⁶ See § 424.

Hanson v. Vernon, 27 Ia. 28; *Whiting* ⁷ See *Cooley, Taxation*, 2nd ed. 114.

puted than that of taxation, because a reasonable compensation is always paid in the first instance, while a tax is "a forced exaction without any pecuniary return."¹ It seems, however, that no positive conclusion in respect to the purposes of the eminent domain should be inferred from the fact that the power of taxation is also restricted to the promotion of public purposes.²

As the state may exercise a broad discretion in the choice of agents,³ the status of the agent chosen has little bearing on the question of the publicity of the use itself. Still it may be said that publicity of use is most questionable when the agent is a private corporation, less questionable when it is a political corporation, least questionable when the state itself is the actor.

§ 52. *Necessity*. — The first question in respect to a proposed use is as to its necessity. *Necessity* is used in several connections in the law of eminent domain. A highway is a *necessity*, in a general sense. But the *necessity* of a highway from A. to B., may be a point to be settled by a particular tribunal.⁴ Again, an undertaking may satisfy both of these conditions, and yet offend against a third *necessity*, in that its promoters attempt to take an unnecessary quantity of land.⁵ It is with the first necessity that we are now concerned, — the relation of the proposed use to the general welfare. In *West River Bridge Company v. Dix*,⁶ Justice Woodbury approved the strictest construction of the word, and intimated that the eminent domain could not be exerted in favor of such works as custom-houses, hospitals, and prisons, as there could be no necessity for their location in a particular place.⁷ This construction has not been adopted. The absolute necessity of a particular location is not in any case a prerequisite to the exercise of the eminent domain, — for example, the promoters of a railroad may receive the power. Further, the strict meaning of necessity is not generally insisted upon in describing the use itself. There are many pur-

¹ *Ryerson v. Brown*, 35 Mich. 333.

² See *Opinions of Justices*, 150 Mass. 592; *Hamilton v. Annapolis & E. R. R.*, 1 Md. 553.

³ See § 106.

⁴ See §§ 322, 350.

⁵ See § 185.

⁶ 6 How. 507.

⁷ Criticised in *Williams v. School Dist.*, 33 Vt. 271.

poses of admitted publicity which, beside the necessity of a fort, would be accurately called conveniences.¹

The magnitude of the interests involved seems to have been in some cases the determining factor in upholding the necessity for condemnation.² This seems to account for the distinction drawn by Chief Justice Shaw between a single mill and a great mill power, the latter a public use,³ the former not.⁴ Whatever merit there is in this particular distinction⁵ there is doubtless some, albeit an undefinable, force in the principle. One might admit the publicity of lateral railroads and irrigation works in states containing great mineral deposits, and vast tracts of arid land,⁶ and deny the necessity of these works in states where mineral wealth and desert land are so insignificant as to render the public gain by their development absurdly disproportionate to the private benefit.

There is some force in the suggestion that "what shall be considered a public use may depend somewhat on the situation and wants of the community for the time being."⁷

It appears that a use the object of which is merely pleasure or ornament, is not a necessary use.⁸ The drawing of harbor lines for the purpose of securing an unobstructed view of an ornamental bridge, is not a legitimate object of the right of eminent domain.⁹ It has been held that necessity is not made out by proof of great convenience, nor of enhancement of values, nor of accumulation of properties of the same kind for the same use.¹⁰

§ 53. It has been frequently said, that the determination of necessity is within the sole competency of the legislature.¹¹ But what is meant is that, assuming that the use is essentially public,

¹ See *Shaver v. Starrett*, 4 Ohio St., 494; *Commissioners v. Moesta*, 91 Mich. 149; *Jerome v. Ross*, 7 Johns. Ch. 315.

² See *Gt. Falls Man. Co. v. Fernald*, 47 N. H. 444.

³ *Hazen v. Essex Co.*, 12 Cush. 475.

⁴ *Murdock v. Stickney*, 8 Cush. 113.

⁵ See § 424.

⁶ See *Onry v. Goodwin*, 26 Pac. Rep. (Ariz.) 376.

⁷ *Scudder v. Trenton Del. Falls Co.*, 1 N. J. Eq. 694.

⁸ See *Gardner v. Newburg*, 2 Johns. Ch. 162; *Niagara Falls & W. R.*, 108 N. Y. 375; *Woodstock v. Gallup*, 28 Vt. 587, *Dillon, Mun. Corp.* § 599.

⁹ *Farist v. Bridgeport*, 60 Conn. 278.

¹⁰ *Spring Valley Water Works Co. v. San Mateo Water Works Co.*, 64 Cal. 123.

¹¹ *Giesey v. Cincinnati, W. & Z. R.*, 4 Ohio St. 308; *Hyde Park v. Cemetery Ass'n*, 119 Ill. 141; *Alexandria & F. R. v. Alexandria & W. R.*, 75 Va. 780; *State v. Rapp*, 39 Minn. 65.

questions of necessity in respect to the time, place, and manner of its accomplishment are administrative, and not within the competency of the judiciary.¹ The necessity of the use itself is really a judicial question, and is in effect passed upon by the courts whenever they affirm or deny the publicity of a particular use.²

Courts have, in some cases, sustained the publicity of a use against the personal judgment of the members, upon the ground of ancient custom,³ and *stare decisis*.⁴

§ 54. **Private Benefit not incompatible with Public Utility.** — Undertakings which are sought to be promoted by the right of eminent domain are often of private benefit. The judicial practice in such cases is to approve the undertaking if it is capable of furthering a public use, and to disregard the private benefit as a mere incident.⁵ This practice is correct where the public interest clearly dominates the private benefit; as, for example, the public interest in railroad transportation dominates the private benefit from tolls. Even where the disproportion between public and private benefit is much less marked, the courts are justified in sustaining a legislative act by singling out the public use. In *Gilbert v. Foote*,⁶ the court denied the constitutionality of a drainage act, because it was expressly intended for private benefit. In *Matter of Ryers*,⁷ an act was sustained which embodied similar provisions, but had for one of its expressed objects the maintenance of the public health.⁸

The fact that the cost of a proposed undertaking is voluntarily defrayed in whole or in part by private persons specially benefited, does not necessarily discredit the publicity of the

¹ See *Shoemaker v. United States*, 147 U. S. 282; *Illinois Cent. R. v. Chicago*, 141 Ill. 586. Compare *Lindsay Irrigation Co. v. Mehrrens*, 97 Cal. 676.

² *Tracy v. Elizabethtown, L. & B. S. R.*, 80 Ky. 259; *Cemetery Ass'n v. Redd*, 33 W. Va. 262; *Moore v. Sandford*, 151 Mass. 285; *St. Paul & N. P. R.*, 34 Minn. 227.

³ *Jordan v. Woodward*, 40 Me. 317. See also *Hoagland v. Wurta*, 41 N. J. L. 175. But see *Sadler v. Langham*, 34 Ala. 311.

⁴ *Atty.-Gen. v. Eau Claire*, 37 Wis. 400.

⁵ *Talbot v. Hudson*, 16 Gray, 417; *Moore v. Sandford*, 151 Mass. 285; *South Chicago R. v. Dix*, 109 Ill. 237. See also *Kean v. Elizabeth*, 54 N. J. L. 462.

⁶ See 72 N. Y. 6 (not reported).

⁷ 72 N. Y. 1.

⁸ Compare also *Atty.-Gen. v. Eau Claire*, 37 Wis. 400, with s. c., 40 Wis. 533.

use.¹ The most extreme application of this proposition is where courts approve works, certain private roads for example, undertaken by private persons at their own charge, for their own benefit, and of no apparent public use, upon the theory that there is nothing to prevent their use by the public.

§ 55. In placing works of partly private use in the list of public uses, it is essential that the private use be incidental and not exclusive.² Thus, where a company were authorized to build a basin, and reserve a part for their sole use, the act was declared unconstitutional.³ Land cannot be condemned for a grist-mill, and also for the private uses of a saw-mill and paper-mill.⁴ But this requirement should not be too narrowly construed. Thus, a comprehensive scheme for the acquisition by a city of the wharf property within its jurisdiction, is not vitiated by the fact that the city is permitted to lease some of the property condemned to private ship-owners. Stated and exclusive berths for important lines are at least no disadvantage to the public, and a public purpose is served by municipal control over wharves in general, and the reservation of sufficient wharf-room for general use.⁵

§ 56. **The Right of the Public to Use.** — An essential feature of a public use is that the public may enjoy its benefits, and, if it be an undertaking for the performance of services, command the services.⁶ Hence, where a corporation was authorized to condemn a right of way for a tramway to be used in transporting stone to a manufacturing company in which the incorporators were interested, the purpose was held to be private, as there was nothing to show that the public had a right to use the way.⁷

¹ *Clarke v. Blackmar*, 47 N. Y. 150; *Provision Co. v. Chicago*, 111 Ill. 651; *Parks v. Boston*, 8 Pick. 218; *North Baptist Church v. Orange*, 54 N. J. L. 111. See also *Townsend v. Hoyle*, 20 Conn. 1; *Santa Ana v. Harlin*, 34 Pac. R. 224 (Cal. 1893). See *Gurnsey v. Edwards*, 26 N. H. 224; *Commonwealth v. Cambridge*, 7 Mass. 158.

² See *Prop. Locks & Canals v. Nashua & L. R.*, 104 Mass. 1.

³ *Eureka Basin*, 96 N. Y. 42.

⁴ *Harding v. Goodlett*, 3 Yerg. 41.

⁵ *Matter of New York*, 135 N. Y. 253.

⁶ *Board of Health v. Van Hoesen*, 87 Mich. 533; *Bonaparte v. Camden & A. R.*, Bald. C. C. 205; *Market Co. v. Philadelphia & R. R.*, 142 Pa. 580; *Kettle River R. v. Eastern R.*, 41 Minn. 461; *Belcher Sugar Ref. Co. v. St. Louis Elevator Co.*, 82 Mo. 121. See also *Lumbard v. Stearns*, 4 Cush. 60; *Life of Benj. R. Curtis*, i. 315.

⁷ *Split Rock Cable Co.*, 128 N. Y. 408.

A freight company, not bound to serve all comers, cannot condemn land for a railroad, and other adjuncts to its wharves.¹

If a use is public in point of law, it is immaterial that comparatively few persons will, in fact, actually enjoy its benefits.²

The uses must not minister solely to sections of the public classified according to distinctions not recognized by law. Thus, it appears that land cannot be condemned for a cemetery for the burial of Roman Catholics only, though such a cemetery is within the purview of a statute forbidding the establishment of a cemetery within a certain distance from a reservoir unless a court shall determine that it is of public convenience and necessity.³ But where the promoters of an undertaking have the right to charge for services, the public to whom they minister are those who are able to pay the charges, which must be uniform and reasonable,⁴ and are willing to conform to all fair regulations.⁵

Property is to be taken only for a public purpose or use. Although *use* in common speech usually conveys the idea of possession and enjoyment, it is here interchangeable with *purpose*. Property destroyed by the state may, nevertheless, be taken for public *use*.⁶

¹ *Memphis Freight Co. v. Memphis*, Works v. Bird, 130 N. Y. 249. See
⁴ Cold. 419. Talbot v. Hudson, 16 Gray, 417.

² *Phillips v. Watson*, 63 Ia. 28; ³ *St. Bernard Cemetery Ass'n* 58
National Docks R. v. Cent. R., 32 N. J. Conn. 91.

Eq. 755; *De Camp v. Hibernia R.*, 47
⁴ See §§ 17-22. N. J. L. 43; *Chicago, B. & N. R. v.*

Porter, 43 Minn. 527; *Ross v. Davis*, 97
⁵ *Evergreen Cemetery Ass'n v.*

Ind. 79; *Lindsay Irrigation Co. v.* Beecher, 53 Conn. 551.

Mehrtens, 97 Cal. 676; *Pocantico Water* ⁶ *Miller v. Craig*, 11 N. J. Eq. 175.

CHAPTER IV.

PROPERTY.

§ 57. Property may be divided into three classes with respect to its utilization for public purposes. Property of the state, — not subject to the right of eminent domain, because it is already held for such uses as the state may designate. Private property, — subject to the right in all cases. Private property already devoted to a public use, — not subject to the right, unless the state plainly intends to modify or supersede the existing public use by a new one. The distinction between public and private property is generally patent. Sometimes, however, the placing of property in one category or the other depends on nice, and not always harmonious, adjudications; as, for example, in the case of riparian property. Again, it may be that property owned by one government within the jurisdiction of another is public or private, according to its character and the use to which it is put.

PUBLIC PROPERTY.

Property of a Foreign State.

§ 58. Property desired by a sovereign may be held in the name of another. As far as international relations are concerned it is settled that the movable property and residence of a foreign minister are not subject to the ordinary local laws.¹ But, while it is clear that the movable effects of a foreign minister should not be subject to the eminent domain of the country of residence, it is equally clear that land owned or leased by the foreign power should not be exempt. Otherwise there would be the absurdity of one state acquiring land by the courtesy of another and lawfully holding it to the impairment of the latter's sovereignty.²

¹ Wheaton, Int. Law, Pt. iii. c. 1, § 17.

² The method by which the Old Protestant Cemetery at Rome was taken

Federal Property.

§ 59. Is land belonging to the United States lying within the boundaries of a State subject to the local eminent domain? Certainly not, if the tract in question has been formally ceded to the United States, for it then becomes federal territory.¹ Nor can a State condemn land which the United States have put to a specific federal use.² Thus, a city cannot lay out a street over land of the United States reserved for military purposes.³ A railroad corporation chartered by Congress is not a federal agency, in the sense that its property is beyond the State's eminent domain.⁴

In *The United States v. Railroad Bridge Company*,⁵ a State law authorized the company to condemn certain public land not put to any specific use. The condemnation was sustained on the ground that the land was not held *publici juris*, but in private proprietorship. In *Van Brocklin v. Tennessee*,⁶ Justice Gray disapproved of this reasoning. He maintained that the United States could not hold land as in private proprietorship, but must hold and apply it to paying the debts, and providing for the common defence and general welfare of the country. This counter-proposition is broad enough to cover an attempt by a State to diminish the revenue of the United States by taxing their property, but hardly warrants the prohibition of the local eminent domain over public lands not devoted to specific fed-

for a municipal use, is not without interest. This cemetery was placed under the control of the Prussian representative near the Papal Court many years ago, and was managed thereafter by the Prussian and later by the German representative, with whom were associated a committee representing the other Protestant Powers. The city of Rome decided to lay out a street through the cemetery, and after a correspondence, in which the power to expropriate does not seem to have been questioned, the German Embassy ceded the cemetery to the city authorities, who on their part ceded a tract for a new cemetery, assumed the expense of reinterment, and further agreed to preserve the tomb

of Keats. See Parliamentary Publication, Italy No. 1, 1889.

¹ See *United States v. Ames*, 1 Wood. & M. 76; s. p. Opinion of the Judges, 1 Met. 580.

² *Ft. Leavenworth R. v. Lowe*, 114 U. S. 525. See also *Barrett v. Palmer*, 135 N. Y. 336.

³ *United States v. Chicago*, 7 How. 185.

⁴ *Union Pacific R. v. Burlington & M. R.*, 1 McCrary, C. C. 452; *Union Pacific R. v. Leavenworth, N. & S. R.*, 29 Fed. Rep. 728. See also *Ft. Leavenworth R. v. Lowe*, 114 U. S. 525. See *Union Pacific R. v. City of Kansas*, 115 U. S. 1.

⁵ 6 McLean, 517.

⁶ 117 U. S. 151.

eral uses. The weight of opinion is with the decision in *The United States v. Railroad Bridge Company*.¹

Property of the States.

§ 60. The relations between the United States and the several States, are on a different basis from that which supports international intercourse. The former are grounded in positive law, the latter rest upon comity. The federal eminent domain has been already defined;² but the question remains, whether a State may hold property which the United States cannot condemn. In *Stockton v. Baltimore & New York Railroad Company*,³ Justice Bradley said, "If it is necessary that the United States Government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it."⁴ This proposition proves itself. So does the other proposition, that the agencies of the State governments are beyond federal aggression.⁵ Both of these propositions must stand. Each must be so interpreted in the light of the other, that their accord will appear. Although the courts are, in ordinary cases, competent to decide only as to the publicity of the purpose, leaving the choice of location wholly within the legislative discretion,⁶ it would seem that in a controversy between the United States and a State the Supreme Court may pass upon the question of location, in order to fairly protect the agencies of the State. The writer suggests the following proposition: The property of a State shall yield to the federal eminent domain, whenever the acquisition of the property is more important to the United States than its retention is to the State. For example, although a necessity might arise to warrant the expropriation of a State capitol for a fortification site, it should not be assumed to justify the transformation of a capitol into a post-office. This hypothetical case seems to conflict with an illus-

¹ *United States v. Chicago*, 7 How. 185; *Ft. Leavenworth R. v. Lowe*, 114 U. S. 525. See also *Flint & P. M. R. v. Gordon*, 41 Mich. 420.

² See §§ 30-33.

³ 32 Fed. Rep. 9.

⁴ See also *Cherokee Nation v. Southern Kansas R.*, 135 U. S. 641.

⁵ *Collector v. Day*, 11 Wall. 113; *United States v. Railroad Co.*, 17 Wall. 322; *St. Louis v. West. Union Tel. Co.*, 148 U. S. 92.

⁶ See § 53.

tration used by Justice Brewer¹ to support an admirable statement of law which we quote elsewhere.² "It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated." If our opinion is correct, a company could not be authorized to construct a railroad upon land devoted to the use of a State capitol, without the assent of the State.

§ 61. Where property is held by a State as trustee for the people of the United States, the latter may carry out the objects of the trust without reference to the wishes of the State, and without compensation. Thus, in a recent case it was held that the soil under the navigable waters of New Jersey, which had vested in the State at the Revolution as a part of the *jura regalia* of the Crown, is held by the State, not as a proprietor, but as trustee for the people of the United States, in this respect at least, that the latter may devote such lands to the furtherance of interstate commerce without compensation to the State.³ Although it has been held that one who has received submerged lands from a State holds them subject to a federal right to place upon them erections in aid of navigation without compensation,⁴ the question has not been decided by the Supreme Court.⁵

§ 62. Where property is held by a State upon a local, as distinguished from a federal, trust, it cannot be dealt with by the United States as their own, but, assuming that federal purposes demand its use, the State may require the payment of compensation. Thus, where a city imposed a tax or rent upon an interstate telegraph company as compensation for a right of way through its streets, the company asserted that an act of Congress, authorizing them to occupy all post roads and letter-carrier routes,

¹ *St. Louis v. West. Union Tel. Co.*, 148 U. S. 92.

² See § 62.

³ *Stockton v. Baltimore & N. Y. R.*, 32 Fed. Rep. 9. See *Decker v. Baltimore & N. Y. R.*, 30 Fed. Rep. 723.

⁴ *Chappell v. Waterworth*, 39 Fed. Rep. 77; *Hill v. United States*, 39 Fed. Rep. 172; *Scranton v. Wheeler*, 57 Fed. Rep. 803.

⁵ *Hill v. United States*, 149 U. S. 593.

gave plenary authority to erect their plant upon the streets in question. The Supreme Court decided otherwise. Said Justice Brewer: "It is a misconception . . . to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is, like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty." Although such property is "devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use or appropriate the same to its own benefit, or the benefit, if any, of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways. They are the property of the State."¹

As a State has no jurisdiction over land lying beyond its territory, it follows that land owned by a State within the borders of another may be treated by the latter as private property.²

Property of Political Corporations. — Municipal Property.

§ 63. Up to this point the discussion has been simply as to the existence of an eminent domain over property held to the use of another sovereign. The present title suggests the leading question whether it is necessary for the sovereign to exert its right of eminent domain in order to control property held by one of its subordinate political corporations. There is a vast amount of property held by these corporations. If this is all the property of the state, the state may devote it to such public purposes as it pleases without paying compensation to the corporation. If any of it can be defined to be the separate property of the corporation, it is in law private property, and can be appropriated only by the right of eminent domain.

¹ *St. Louis v. West. Union Tel. Co.*, 148 U. S. 92. ² *Burbank v. Fay*, 65 N. Y. 57.

§ 64. The most important of these corporations is the municipality. The general relation between it and the state must be outlined before the main question can be considered. The municipal corporation is a political institution created by the state, and deriving all its powers therefrom. It can be compelled by the state to perform such functions and bear such burdens as are within the limits of its powers and responsibilities, and, although there are some cases which seem to accord to the legislature an unlimited discretion in the definition of these limits, the better opinion is that their correctness is finally determinable by the courts.¹ There is not a vested right as against the state in the permanence of any political condition not guaranteed by the Constitution.² Agreeably to this rule, the very existence of a municipal corporation depends on the will of the legislature. A municipal charter is a political instrument, not a contract within the protection of the Federal Constitution.³ But contracts made with a municipal corporation, trusts accepted by it, cannot be impaired by modifying its charter.⁴ A municipal creditor cannot satisfy his judgment by selling the public property of the city upon execution, but must compel the levying of a tax, from the proceeds of which his claim may be satisfied. Upon this the authorities are agreed; but there is this difference in application that, while in some jurisdictions all municipal property is deemed to be public, in others such property as is not devoted to specific governmental use, but is held for profit, is subject to execution as private property.⁵ The familiar rule that public property is presumptively exempt from the incidence of tax laws applies, of course, to municipal property; though even here there is some disposition to avoid, or at least weaken, the presumption in the case of property not held to specific governmental use.⁶ The last point to be noted in this brief sur-

¹ *State v. Haben*, 22 Wis. 660; *Meriwether v. Garrett*, 102 U. S. 472.
People v. Detroit, 28 Mich. 228; *Callam v. Saginaw*, 50 Mich. 7. See also *Cooley*, Const. Lim., 6th ed., 284.

² *United States v. Baltimore & O. R.*, 17 Wall. 322; *People v. Morris*, 18 Wend. 325; *Commonwealth v. Plaisted*, 148 Mass. 375; *Philadelphia v. Fox*, 64 Pa. 169.

³ *Von Hoffman v. Quincy*, 4 Wall. 535; *Girard v. Philadelphia*, 7 Wall. 14; *Mobile v. Watson*, 116 U. S. 289; *People v. Otis*, 90 N. Y. 48.

⁴ See cases in 2 Dillon, Mun. Corp., § 576.

⁵ See *Cooley*, Taxation, 2nd ed. 173.

vey of municipal corporations has been already suggested. It is that although the corporation is the creature of the state, it may by the state's permission acquire purely communal property. Such property is essentially private, and can no more be invaded by the state than the property of a private corporation. This proposition has been approved in many well-considered opinions.¹ From the decisions cited we get this general idea of a municipality, — a government established by the state for the management of communal affairs, bound to perform all duties incident to the objects of its incorporation, subject to disestablishment as a political institution, but having, with these marks of dependency, certain characteristics of a private proprietor.

We are now in a position to classify the different sorts of property held by a municipal corporation, and determine the relation of the state to each. (a) Property devoted to objects of state concern, such as streets; (b) property held upon trusts in which private persons have an interest, as land dedicated to a particular use, and in this class may be included property impressed with a charitable trust; (c) property held and managed for the profit of the community, as gas and water-works.

§ 65. In *Meriwether v. Garrett*,² it was held that upon the dissolution of a municipal corporation the public buildings, streets, squares, parks, promenades, wharves, landings, cemeteries, engine-houses, fire-engines, hose and hose carriages, engineering implements, and everything else held for governmental purposes, and which the city "held for the State," passed into the control of the State. What is the meaning of "held for the State?" It is held, that streets are a part of the general highway system,³ and, therefore, may be put to such use as the State may decree without compensation to the city.⁴ The same power should be exercisable, it appears, over free wharves and landings, for they are links between public ways by land and water.⁵

¹ *People v. Detroit*, 28 Mich. 228; 509. Compare *Darlington v. New York*, *Meriwether v. Garrett*, 102 U. S. 472; 31 N. Y. 164; *Duanesburg v. Jenkins*, *Essex Road Board v. Skinkle*, 140 U. S. 57 N. Y. 177.
² 102 U. S. 472. ³ See § 397.
⁴ *People v. Kerr*, 27 N. Y. 188.
⁵ See *Portland & W. R. v. Portland*, *Hope Cemetery v. Boston*, 158 Mass. 14 Or. 188.

With regard to other property of the municipality, it seems that the control of the state should depend upon the object for which it is proposed to be exerted. For example, assuming that the state can compel a city to use a part of its property for a municipal building, does it follow that it can take the property for a capitol, or, to put a more striking case, can it convert a city hall into a capitol without compensation? Decisions defining the power of the state to compel the municipal corporation to levy taxes in furtherance of public works are pertinent, for if a city cannot be coerced into spending money for a given object, neither can it be forced to devote property to it. The state can compel the municipality to provide such properties as are deemed essential to the administration of communal affairs,¹ though even here the best judgment approves a power of judicial review of legislative action, so as to prevent the arbitrary imposition of unnecessary burdens upon a defenceless city.² Further, the municipality may be ordered to pay for an undertaking of state concern when it is of evident local benefit, as in the case of streets,³ and bridges.⁴ But it has been justly decided, that the state cannot compel a city to burden itself with an undertaking of distinctively foreign interest, such as a county building,⁵ or a state normal school.⁶ These cases illustrate the rule laid down by Chief Justice Parker in *Hampshire v. Franklin*,⁷ "It is not in the power of the legislature to create a debt from one person to another, or from one corporation to another without the consent, express or implied, of the person to be charged," — a rule, be it noted, of no significance if, in the judgment of the court, the legislature commands the performance of a municipal duty.

§ 66. A municipal corporation may assume in certain cases the character of a private proprietor as against the state. Thus, when it undertakes to supply its inhabitants with gas or water, the property acquired in furtherance of the enterprise is private.⁸

¹ *Perkins v. Slack*, 86 Pa. 270.

⁶ *State v. Haben*, 22 Wis. 660. Com-

² *People v. Detroit*, 28 Mich. 228. pare *Gordon v. Cornes*, 47 N. Y. 608.

See also *Dillon, Mun. Corp.*, § 74 a.

⁷ 16 Mass. 76.

³ *People v. Flagg*, 46 N. Y. 401.

⁴ *Philadelphia v. Field*, 58 Pa. 320.

⁵ *Callam v. Saginaw*, 50 Mich. 7.

⁸ *Bailey v. New York*, 3 Hill, 531 ;
Western Savings Fund Society v. Philadelphia, 31 Pa. 175.

A common,¹ or a ferry,² belonging to a community, is not necessarily the property of the people at large. Where a town has lawfully acquired land for the purpose of sale, the state cannot set it off to a newly erected municipality.³ A wharf from which a city is entitled to obtain a revenue cannot be made a free wharf unless compensation is given.⁴ It has been held that the state cannot freely take the site of a city reservoir for a park.⁵ In the *Mount Hope Cemetery Association v. Boston*,⁶ it was decided that the city held a certain cemetery as in private proprietorship, and that the legislature could not compel the city to transfer the property to a private corporation without compensation.

§ 67. Property held by the corporation by virtue of its dedication to a public use is of a peculiar character. It is held upon condition, and if the condition be broken by the diversion of the property to another use, the dedicator may assert his reversionary interest. Now as long as the purpose of the dedication is carried out in fact, it seems immaterial whether it be accomplished by the corporation acting of its own motion, or at the behest of the state. Thus, where land was dedicated for a public square, it was held that the legislature could compel its use for municipal buildings, as this was within the scope of the dedication.⁷ It also appears, that the state may cause the purpose of dedication to be furthered by an agency other than the municipality. Thus, a railroad company may be authorized to occupy land dedicated to a city for a public levee, without compensating the city, the trust being unimpaired as the company was prohibited from charging wharfage.⁸ But the city may resist an attempt by the state to treat the property as its very own by granting it for a public use inconsistent with the purpose of dedication. Thus, it has been held that the state

¹ *Sheffield & T. St. Ry. v. Rand*, 83 Ala. 294. Pt. 1, 190. See also *Railroad Co. v. Ellerman*, 105 U. S. 166.

² *Benson v. New York*, 10 Barb. 223.

³ *Webb v. New York*, 64 How. Pr. 10.

⁴ *Town of Milwaukee v. City of Milwaukee*, 12 Wis. 103. See also *Windham v. Portland*, 4 Mass. 384.

⁵ 158 Mass. 509.

⁷ *Baird v. Rice*, 63 Pa. 489.

⁸ *Ellerman v. McMains*, 30 La. An. Or. 188.

⁶ *Portland & W. R. v. Portland*, 14

cannot grant to a railroad company a right of way over land given to a city for a park.¹

While it appears that the state can force the city to devote the property in question to any purpose within the purview of the dedication, it seems that the city cannot assert a right of private property against the state under any circumstances, for, if the state should put the property to uses foreign to the purpose of dedication, it must compensate the dedicator, whose right of property is thereby revived.

§ 68. The cases on state control over municipal property show a wide range of judicial opinion, in some respects. The extreme judgments are those of *Duanesburgh v. Jenkins*,² which upholds an act forcing a town to bond itself in aid of a railroad, upon the theory that what the legislature can permit a municipality to do it can compel it to do, and *People v. Detroit*,³ the reasoning of which, unless strictly limited to the case at bar, might prevent the state from compelling the municipality to fulfil all the proper purposes of its creation.⁴ But the true theory of state control lies much nearer the second judgment than the first. The declaration of Judge Cooley in the Michigan case, that the state cannot "deprive the city of property actually acquired by legislative permission" presents, if rightly understood, the best law on the subject.

The doctrine of a limited municipal independence does not involve the political absurdity of an autonomous municipality. It does not deny the control of the state in all matters of real state concern. But it recognizes a municipal interest distinguishable in law, as it certainly is in fact, from the interest of the state, and accords to it a just protection. It is in harmony with social and economic conditions to which the spirit of laws must sooner or later conform. The municipal corporation is the most complex of political organizations. It performs functions which neither the State, nor the Federal Governments can prop-

¹ *Jacksonville v. Jacksonville R.*, 67 Ill. 540; *New Orleans, M. & C. R. v. New Orleans*, 26 La. An. 478. See *Warren v. Lyons City*, 22 Ia. 351; *Price v. Thompson*, 48 Mo. 361.

² 57 N. Y. 177.

³ 28 Mich. 228.

⁴ See *Dillon, Mun. Corp.*, § 73.

erly assume, for it deals with the domestic affairs of people massed in communities. Just how far this desirable recognition of communal rights is generally obtainable without express constitutional enactment, it is impossible to say in the present state of the law, but there appears to be a strong and growing prepossession in their favor.¹

§ 69. The courts are occasionally called upon to define the power of the state over the property of political corporations other than municipal. A road board was empowered to sell lands on which assessments had not been paid, and, in default of buyers, to hold the property for sale. A later statute contemplated the withdrawal of the lands from the control of the board. It was decided that there was not a deprivation of property, as the board was a mere public agency holding the land in trust for the state.² It has been held that property of a state board of agriculture may be so far private that it cannot be handed over to a new corporation.³

Property of Eleemosynary Corporations, etc.

§ 70. Property which cannot be readily placed in either the purely political, or purely private class, is that held by corporations upon eleemosynary trusts and the like. The courts are occasionally called upon to decide whether the power of the state may be freely exerted upon such property. In *Dartmouth College v. Woodward*,⁴ it was held, that educational and charitable corporations were not necessarily of a public character, that the college in question was not subject to the control of the State, and that its charter was a contract and, therefore, could not be impaired. A State attempted to divest the property of a university chartered by a preceding Territorial Government, upon the theory that the corporation was essentially public, and hence passed into its control. The act was characterized as an assumption of arbitrary power, as the corporation was private.⁵

¹ Consult *The Legislature and the Streets*, by Prof. H. J. Goodnow, 26 Am. L. Rev. 520.

² *Downing v. State Board, etc.*, 129 Ind. 443.

⁴ 4 Wheat. 518.

³ *Essex Road Board v. Skinkle*, 140 U. S. 334; s. c. 49 N. J. L. 641.

⁵ *Vincennes University v. State*, 14 How. 268.

A statute which declared that a chartered seminary should be thenceforth a common school, and as such should be under the control of the school directors, was pronounced void, as an attempt to transfer property arbitrarily from one corporation to another.¹

Public Waters.

§ 71. The dividing line between public and private waters is not in all cases easy to determine, indeed its location is not always a matter of agreement.

The proprietary right over waters is determined by the ownership of the underlying soil. According to the common law all land covered by tidal waters is public, all covered by non-tidal waters is private.² In the United States, there is no uniform test for determining the title to subaqueous soil. Some States follow the common law, others discard it as inapplicable to the local physical conditions. There is substantial accord in respect to the publicity of tidal waters, but the sensible qualification has been made that such waters must be capable of useful navigation to be public, thus relegating tidal rivulets and the like to the list of private waters.³ Tidal waters are not necessarily salt, but include fresh water affected by tidal action.⁴ Rivers not affected by the tides are, in some States, considered private according to the common law.⁵ In other States the tidal test is deemed wholly inapplicable to countries traversed by non-tidal navigable streams, and such are held to be public.⁶ The great

¹ *Lebanon School Dist. v. Lebanon Bridge*, 41 Mich. 453; *Olson v. Merrill-Female Seminary*, 22 W. N. C. (Pa.) 65.

² *Bristow v. Cormican*, 3 App. Cas. 641. *v. Smith*, 84 Ky. 372; *Magnolia v. Marshall*, 39 Miss. 109; *Atty.-Gen. v. Delaware, & R. B. R.* 27 N. J. Eq. 631; *Jones v. Soulard*, 24 How. 41. See also *State v. Pacific Guano Co.*, 22 S. Car. 50; *Wethersfield v. Humphrey*, 20 Conn. 218; *Commonwealth v. Vincent*, 103 Mass. 441.

³ *Glover v. Powell*, 10 N. J. Eq. 211. See also *State v. Pacific Guano Co.*, 22 S. Car. 50; *Wethersfield v. Humphrey*, 20 Conn. 218; *Commonwealth v. Vincent*, 103 Mass. 441.

⁴ *Peyroux v. Howard*, 7 Pet. 324; *Atty.-Gen. v. Woods*, 108 Mass. 436; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21. ⁵ *Carson v. Blazer*, 2 Binn. 475; *Fulmer v. Williams*, 122 Pa. 191; *People v. Gold Run D. & M. Co.*, 66 Cal. 138; *Bullock v. Wilson*, 2 Port. 436; *St. Louis, I. M. & S. R. v. Ramsey*, 53 Ark. 314; *Union Depot, etc. Co. v. Brunswick*, 31 Minn. 297; *Shaw v. Oswego Iron Co.*, 10 Or. 371; *Benson v. Morrow*, 61 Mo. 345; *McManus v. Car-*

⁶ *Fuller v. Dauphin*, 124 Ill. 542; *Enfield Bridge Co. v. Hartford & N. H. R.*, 17 Conn. 40; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Gavit v. Chambers*, 3 Ohio, 495; *Maxwell v. Bay City* Bridge, 41 Mich. 453; *Olson v. Merrill-Female Seminary*, 22 W. N. C. (Pa.) 65. 42 Wis. 203; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372; *Magnolia v. Marshall*, 39 Miss. 109; *Atty.-Gen. v. Delaware, & R. B. R.* 27 N. J. Eq. 631; *Jones v. Soulard*, 24 How. 41. See also *State v. Pacific Guano Co.*, 22 S. Car. 50.

lakes or inland seas are public.¹ The smaller lakes are in some States private,² in others public.³

In some cases courts are obliged to place certain waters in a special class, because they are subject to peculiar laws. Thus, in New York the Hudson above tide water and the Mohawk are public rivers, because they are so considered in the Dutch grants; and the lakes lying within the territory acquired by treaty with Massachusetts are private, if for no other reason, because they were so by the law of the latter State.⁴ In Massachusetts the great ponds are public, because so declared by the Colonial Ordinance of 1647.⁵

§ 72. The proprietary rights of the United States attach to such waters only as are within the District and Territories. The fact that a river is an interstate boundary does not make it federal property. For example, the title to the bed of the Mississippi is in the riparian owner or the State according to the local law.⁶ So far as federal waters are concerned, the common-law rule as to non-tidal waters has been generally reversed by statutes, which declare that the title of a riparian owner on navigable waters within the public lands of the United States does not extend beyond the bank.⁷ But it appears that if the State in which such lands are located follows the common-law rule as to the privacy of non-tidal waters, the riparian owner will hold to the centre of the stream.⁸

§ 73. Where a body of water is public, the question arises as to what line on the shore the title of the state extends. In

Keokuk, 94 U. S. 324; Chicago, B. & N. W. R. v. Porter, 72 Ia. 426; Norfolk v. Cooke, 27 Gratt. 430.

¹ People v. Jones, 112 N. Y. 597; Austin v. Rutland R., 45 Vt. 215; Rice v. Ruddiman, 10 Mich. 126; Sloan v. Biemiller, 34 Ohio St. 492; Illinois Central R. v. Illinois, 146 U. S. 387; Dietrich v. Northwest Union R., 42 Wis. 248.

² Hardin v. Jordan, 140 U. S. 371; Clute v. Fisher, 65 Mich. 48; Cobb v. Davenport, 32 N. J. L. 369; Gouverneur v. Nat'l Ice Co., 134 N. Y. 355.

³ State v. Gilmanton, 9 N. H. 461; Delaplaine v. Chicago & N. R. 42 Wis. 214.

⁴ See Smith v. Rochester, 92 N. Y. 463.

⁵ Watuppa Reservoir Co. v. Fall River, 147 Mass. 548.

⁶ Jones v. Souland, 24 How. 41; Barney v. Keokuk, 94 U. S. 324.

⁷ Railroad Co. v. Schurmier, 7 Wall.

⁸ Norcross v. Griffiths, 65 Wis. 599.

tidal waters the ownership of the shore is in the state up to high-water mark.¹ This rule is changed in Massachusetts and Maine by the Colonial Ordinance of 1647, which declares that the owner of the littoral shall own to low-water mark, so that he holds not more than one hundred rods below high-water mark,² the boundary mentioned being extreme low-water mark.³ The boundary of the public estate in land under non-tidal waters is in some States the high-water mark,⁴ in others the low-water mark.⁵

Where one owns to the shore bounding public waters and the shore line is advanced, the new land belongs, as a rule, to him. This whether the addition is due to deposits of alluvion,⁶ or to reclamation by the state's permission.⁷ Upon the same principle a wharf unlawfully attached to the shore belongs to the riparian owner.⁸ The right of property in accretions may be qualified by the circumstances of the particular case. Thus, where the state permits a person to reclaim land beyond the terminus of a highway, it is presumed that the highway is to extend over the reclaimed land,⁹ although this presumption may be rebutted by the terms of the grant.¹⁰ A riparian owner received his land by a public grant which reserved a highway easement along the shore. The shore line was advanced by natural accretion, and a railroad corporation was authorized to build on the land thus formed. It was held that the owner of the fee was not injured, as the railroad was not inconsistent with the easement reserved.¹¹

¹ *Long Beach Land, etc. Co. v. Richardson*, 70 Cal. 206; *New Jersey Zinc Co. v. Morris Canal*, 44 N. J. Eq. 398. *Minn.* 297; *Austin v. Rutland R.*, 45 Vt. 215.

² *Commonwealth v. Charlestown*, 1 Pet. 662. See also *Donovan v. New*

Pick, 179; *Lapish v. Bangor Bank*, 8 Orleans, 35 La. An. 461.

³ *Sewall, etc. Co. v. Water Power* v. *Hoboken Land, etc. Co. v. Pennsylv-*

Co., 147 Mass. 61. *ania R.*, 124 U. S. 656.

⁴ *Chicago, B. & Q. R. v. Porter*, 72 *Steers v. Brooklyn*, 101 N. Y. 51.

Ia. 426. *People v. Lambier*, 5 Denio, 9;

⁵ *Fulmer v. Williams*, 122 Pa. 191; *Hoboken Land, etc. Co. v. Hoboken*, 36

Sherlock v. Bainbridge, 41 Ind. 35; *N. J. L.* 540.

Union Depot, etc. Co. v. Brunswick, 31 *Hoboken Land, etc. Co. v. Penn-*

sylvania R., 124 U. S. 656.

¹¹ *Cook v. Burlington*, 30 Ia. 94.

PRIVATE PROPERTY.

§ 74. Private property is one of the most important and complex titles of the law of eminent domain. Many marked differences of opinion as to what constitutes a taking of property are due to different answers to the primary question, — Is there a right of property involved? The rights and obligations of the eminent domain extend to property of every sort,¹ or, to adopt the more particular statement of Chief Justice Shaw,² they extend "to real estate held in fee, or an easement or lien on real estate, or personal property, . . . every valuable interest which may be enjoyed as property and recognized as such."

In controversies arising from expropriation private property may be viewed from two standpoints. From the standpoint of the expropriator it is simply the thing desired for public use. From the dominating standpoint of the owner it includes every valuable right which is affected by the act of expropriation. For example: A owns land which B condemns for a railroad right of way. The land is all that B wants, yet C may claim indemnity for the destruction of his private way across the land. B must pay for the useless easement in order to gain the useful land.³

§ 75. A claim for compensation is sometimes resisted on the ground that the claimant has not a lawful property in the thing in question. If this position is substantiated the claim fails. One cannot assert a right in an unlawful possession or use of property.⁴ In *Kingsland v. New York*,⁵ the plaintiff's lessee had built sheds upon a wharf, with the consent of the city. This consent was unlawful, and, in condemning the wharf right, the city refused to pay for the sheds. The court sustained the city because the plaintiff had no property in unlawful erections. Land unlawfully reclaimed beyond the private water line is not

¹ *Eastern R. v. Boston & M. R.*, 111 Mass. 125; *Met. City R. v. Chicago*, W. D. R., 87 Ill. 317; *Gulf, C. & S. F. R. v. Fuller*, 63 Tex. 467. ⁴ *Tainter v. Morristown*, 19 N. J. Eq. 46; *Dwight Printing Co. v. Boston*, 122 Mass. 583. See also *Pierce v. Somersworth*, 10 N. H. 369; *Baltimore v. Warren Man. Co.*, 59 Md. 96.

² *Old Colony & F. R. R. v. County of Plymouth*, 14 Gray, 155. ⁵ 110 N. Y. 569.

³ See § 134.

property as against the state or its agent occupying it for the public use.¹ One cannot have compensation for the destruction of a crossing which he had unlawfully maintained over a highway,² nor for buildings unlawfully erected within the limits of a highway.³

A nuisance may be separable from the property which supports it. In such case the separation should be made, and compensation paid for the lawful property. A corporation resisted a claim for compensation on the ground that the premises were rented for immoral purposes. The court admitted that evidence showing that the premises had been rendered less valuable for immoral purposes would be incompetent, on the ground of public policy, but held there was a lawful property in the premises themselves, notwithstanding the uses to which they were put.⁴

A possession, wrongful as against the state, may yet give a right against a corporation acting under an authority which does not treat the possession as illegal.⁵ Thus, where one built upon land laid out, but not opened, as a street, the erection was considered private property as against a railroad company seeking a right of way, although the city, on opening the street, might abate it as a nuisance.⁶ The same principle is illustrated in *Renwick v. Railroad Company*.⁷ A person, acting under the authority of the State of Iowa, built an embankment in the Mississippi River above low-water mark. The United States having asserted their power to prohibit the erection of such works, a railroad company chartered by the State refused to make compensation for a right of way over the embankment, on the ground that it was a purpresture. The Supreme Court decided that, although the embankment was a purpresture, the United States had not moved to abate it, and so were not inter-

¹ See *Union Depot R. v. Brunswick*, 483. See also *Ely v. Supervisors*, 36 31 Minn. 297. N. Y. 297.

² *Harvey v. Lackawanna & B. R.*, 47 Pa. 428. ⁵ *White v. South Shore R.*, 6 Cush. 412; *Mason v. Harper's Ferry Bridge*, 20 W. Va. 223. See also *Prospect Park*

³ *Thibodeaux v. Maggioli*, 4 La. An. 73; *Pittsburgh, V. & C. R. v. Rose*, 74 Pa. 362. ⁶ *Quigley v. Pennsylvania, S. V. R.* & C. I. R. v. *Williamson*, 91 N. Y. 552.

⁴ *Lawrence v. Met. El. R.*, 126 N. Y. 121 Pa. 35.

⁷ 102 U. S. 180.

ested in the case; that as far as the public were concerned the railroad was as unlawful as the embankment; and that, in the absence of federal intervention, the company must pay compensation according to the law of the State. Where one leases land from a city, and covenants not to sublet it without the lessor's consent, a breach of the covenant does not enable a railroad company condemning the land to refuse compensation to the sublessee, on the ground that he has not a lawful possession. The city alone can take advantage of the breach of a covenant made for its benefit.¹

§ 76. Does the rule that property in custody of a receiver cannot be made the subject of suit until the permission of the court is obtained apply in respect to condemnation? It has been so applied in England in the case of an infant's land,² and in this country in the case of corporate property in the hands of a receiver appointed by a federal court.³ In *Central Railroad Company v. Pennsylvania Railroad Company*,⁴ the court said: "If it be contemplated to take its [a corporation in the hands of a receiver] land by condemnation, the consent of this court will, in deference to the tribunal and the orderly administration of justice, be sought, and in a proper case it will be accorded as a matter of course." The question is not of much practical importance, perhaps, as the consent of the court would be as readily obtained in the case of condemnation as in an ordinary suit. But as a matter of principle we are inclined to agree with Mr. Wood,⁵ that the consent of the court is not necessary in order to condemn property in the hands of a receiver.

Real Property.

§ 77. The subjection of *land*, using the word in its common meaning, to the right of eminent domain, is so evident that the citation of supporting cases is unnecessary. But among the wider uses of the word in law is that it describes earth and

¹ *Ehret v. Schuylkill River E. S. R.*, 151 Pa. 158.

² *Tink v. Rundle*, 10 Beav. 318.

³ *West. Un. Tel. Co. v. Atlantic & P. Tel. Co.*, 7 Biss. 367.

⁴ 31 N. J. Eq. 475.

⁵ *Railway Law*, 1666.

water in every natural condition, and all things artificially annexed to them. Hence where there is an authorization express or implied to condemn *land*, the expropriator may take land under water,¹ a coal bed,² land with buildings upon it,³ and in fine all improvements, interests, and appurtenances included within the term "real estate."⁴ A singular case is *Matter of Board of Street Opening*, etc.,⁵ where a church corporation objected to the condemnation of the fee of one of its graveyards for a park, on the ground that such action would effect the absurd result of taking for public use the bodies interred. The court sustained the condemnation as that of ordinary private land, at the same time intimating that the city succeeded to the responsibilities of the church corporation with regard to the decent disposition of the bodies.

Public authorities have been authorized to condemn materials for the construction and repair of highways.⁶ Courts have approved the extension of this right to railroad,⁷ and canal companies.⁸

The Lands Clauses Act provides for the taking or injurious affecting of "lands or . . . any interest therein;"⁹ and *lands* are defined as "messuages, lands, tenements, and hereditaments of any tenure."¹⁰ Among the things not included are a right of the directors of a corporation to use a board-room at certain times for certain purposes,¹¹ and pipes placed in a street by a water-company.¹² One having the right as one of the public to bring boats to a dock has not an interest in land, although the right is peculiarly valuable to him, owing to the nearness of his property to the dock.¹³

¹ *New York Cent. R. R.*, 77 N. Y. 248. Vt. 365; *Strohecker v. Alabama & C. R.*, 42 Ga. 509. See *New York & C. R. v. Gunnison*, 1 Hun, 496.

² *Brown v. Corey*, 43 Pa. 495.

³ *Brockett v. Ohio & P. R.*, 14 Pa. 241. See *Highway Case*, 22 N. J. L. 293. See § 238-241.

⁴ *State v. Tichenor*, 41 N. J. L. 345.

⁵ 62 Hun, 499; s. c. 133 N. Y. 329.

⁶ *Hatch v. Hawkes*, 126 Mass. 177. See also *Kemper v. Cincinnati & C. W. Turnpike*, 11 Ohio, 392. See §§ 104, 208, 276.

⁷ *Vermont Cent. R. v. Baxter*, 22 4 Q. B. 358.

⁸ *Wheelock v. Young*, 4 Wend. 647.

⁹ See § 68.

¹⁰ See § 3.

¹¹ *Municipal Freehold, etc. Co. v. Metropolitan R.*, 1 Cababé & Ellis, 184.

¹² *New River Co. v. Midland R.*, 36 L. T. 539.

¹³ *Queen v. Met. Bd. of Works, L. R.*,

§ 78. A difficult question in respect to the control of waters in the public interest, is the determination of the existence and extent of a private right. Assuming that there is a private property in the water, it is rarely characterized by the broad right of enjoyment which accompanies property in the soil. It may be subjected to a public easement.¹ It may be itself but an easement in public waters, a riparian right.² Finally, it is usually qualified by the equal rights of other private proprietors. Where a city condemns the water from all the springs and streams on certain land, compensation should be assessed upon the theory that the owner's right in the water is limited to its reasonable use in connection with his own land. Although he cannot sell all the water, he may sell as much as will not diminish the stream to the injury of lower proprietors, and this qualified right should be considered in assessing compensation.³

§ 79. It sometimes happens, that the acquisition of an easement, or other incorporeal right, will directly further the public use. Again, it may be that public property cannot be freely utilized because it is subject to private easements. Far more frequently the condemnation of land affects incidentally easements and appurtenances connected therewith. In any case the easement is property within the purview of the right of eminent domain.⁴ The most important easements affected by the eminent domain are the riparian right,⁵ and the private easement in streets.⁶ Evidence may be given of a prescriptive right to pollute water.⁷ Where one released a private way over the land of another, and the land was afterwards condemned, it was held that he could not have compensation for the deprivation of a way of necessity.⁸ A mere privilege, dependent on the will of

¹ See § 420. ² See § 91.

³ *Harwood v. West Randolph*, 64 Vt. 41. See *Clark v. Pennsylvania R.*, 145 Pa. 438.

⁴ *Arnold v. Hudson River R.*, 55 N. Y. 661; *Eleventh Ave.*, 81 N. Y. 436; *Story v. New York El. R.*, 90 N. Y. 122; *Philadelphia, W. & B. R. v. Williams*, 54 Pa. 103; *Pearsall v. Supervisors*, 74 Mich. 558; *Boston Gas Light Co. v. Old Colony & N. R.*, 14 Allen, 444; *Googins*

v. Boston & A. R., 155 Mass. 505; *Indianapolis & C. Road v. Belt Ry.*, 110 Ind. 5; *Galena & S. W. R. v. Haslam*, 73 Ill. 494; *Met. City R. v. Chicago*, W. D. R., 87 Ill. 317. See also *Barlow v. Ross*, 24 Q. B. D. 381.

⁵ See § 91.

⁶ See Ch. XIII.

⁷ *Martin v. Gleason*, 139 Mass. 183.

⁸ *Richards v. Attleborough R.*, 153 Mass. 120.

another party, is not property, and need not be considered in the assessment of compensation.¹ It has been held that a privilege which any one may enjoy cannot be considered as enhancing the value of a particular tract, although its special utility in connection with the tract is evident. Hence, compensation has been refused for cutting off access from a farm to a watering-place for cattle, situated on the further side of a highway.²

§ 80. A singular controversy has arisen recently between telephone and electric railway companies. The return current of the telephone is frequently carried by the earth. The return current of the electric railway is carried by the rails. It often happens that electricity escapes from the rails, runs in indeterminate courses through the earth, and affects the telephone current. Upon these admitted facts telephone companies have sued the promoters of electric railways, alleging an interference with a right of property in the soil secured to them by charters permitting the construction and operation of telephone lines. The courts in this country have usually denied the claim of an exclusive property in the earth based on the mere incorporation of a telephone company.³ But in a recent English decision,⁴ the prevailing American view was discarded as being opposed to the principle of *Rylands v. Fletcher*,⁵ although relief was denied upon another ground.⁶

Personal Property.

§ 81. It has been said that money is not subject to the right of eminent domain, except that in time of war a forced loan might be justified under this power.⁷ This view has been deemed to restrict unduly the potentialities of the power, and

¹ *Ranlet v. Concord R.*, 62 N. H. 561; *St. 390*; *Hudson River Tel. Co. v. Water-vliet R.*, 135 N. Y. 393; *Richards v. Cincinnati & I. R.*, 18 Ohio St. 92; *Attleborough R.*, 153 Mass. 120.

Strickland v. Pennsylvania R., 154 Pa. 348.

² *Gorgas v. Philadelphia, H. & P. R.*, 144 Pa. 1.

³ *Cumberland Tel. Co. v. United Electric R.*, 42 Fed. Rep. 273; *Cincinnati, etc. R. v. Telegraph Ass'n*, 48 Ohio

⁴ *National Tel. Co. v. Baker* (1893), 2 Ch. 186.

⁵ *L. R.*, 3 H. L. 330. See § 146.

⁶ See § 145.

⁷ *People v. Brooklyn*, 4 N. Y. 419. See also *Burnett v. Sacramento*, 12 Cal. 76; *Cooley's Const. Lim.*, 6th ed. 647.

it has been said that, not only in the crisis of war, but in times of pestilence or famine, the state may forcibly borrow money.¹ The writer has not found a case where the avowed object of an act is the condemnation of money. But this object was discovered, and the act set aside in *Cary Library v. Bliss*,² where a corporation was empowered to exercise the eminent domain, in order to gain control of a library fund vested in the selectmen of a town. Justice Bradley, in his dissenting opinion in the *Sinking Fund Cases*,³ declared that when a corporation was obliged by its charter to pay a debt at a certain time, a subsequent command to set aside annually a sum of money as a sinking-fund was not merely the impairment of a contract, but "an actual or physical taking of property." Statutes commanding the expenditure of money by virtue of the police power have been already considered.⁴ They are sustained if they compel the performance of a duty to which the person or corporation affected is already subject, but not if the duty be arbitrarily imposed. Putting aside the possibility of a forced emergency loan, as beyond the normal conditions on which our laws are based, it may be said that money is not subject to condemnation.

It cannot be said that personal chattels are not subject, theoretically, to the eminent domain. But, as in the case of money, it would be difficult to prove a necessity for their expropriation under normal social conditions, at least under the rule of American constitutional law.

A right of action is property which may be affected by the exercise of the eminent domain. Where one has a right to recover damages for the flooding of his land, it cannot be transferred to a corporation except on compensation.⁵ One whose reversionary interest in land has been damaged during the wrongful occupation of a railroad company cannot bring his action after his interest has been condemned, for the company has, in effect, condemned and paid for the right of action.⁶

¹ *Hammett v. Philadelphia*, 65 Pa. 146.

² 151 Mass. 364.

³ 99 U. S. 700, 746.

⁴ See § 15.

⁵ *Neponset Meadow Co. v. Tileston*, 133 Mass. 189.

⁶ *Dunlap v. Toledo, A. A. & G. T. R.*, 50 Mich. 470. See also *Morris Canal Co. v. Townsend*, 24 Barb. 658.

The patentee of an invention has a complete right of property in it, for the patent is granted as of right, not of favor. Therefore, the United States cannot make use of an invention without compensation.¹ But the government may enact that a person in whose shop a machine is set up before the issuing of the patent by the inventor, an employee, may continue to use it without compensation.²

§ 82. **Contracts.**—An important title of our present subject is that of contracts, especially those which are expressed in corporate charters. When the Supreme Court decided in the Dartmouth College case,³ that a corporate charter was a contract, fears were expressed lest the beneficiaries might be possessed of impregnable monopolies. These fears were dissipated by the decision in *West River Bridge Company v. Dix*,⁴ in which it was declared that corporate franchises could be divested on payment of compensation. A franchise, then, is property subject to the eminent domain.⁵

The subjection of franchises to the eminent domain is expressly declared in many State Constitutions.⁶ An act which enables railroad companies owning riparian land to own and employ vessels for the carriage of freight, and prohibits companies not owning such land from condemning it, is in conflict with a constitutional declaration that the eminent domain shall not be so abridged that corporate property and franchises cannot be condemned.⁷

§ 83. The fact that the franchise is an exclusive one, the ordinary mark of an exclusive franchise being the right to exclude competition within a certain territory,⁸ does not prevent

¹ *United States v. Burns*, 12 Wall. 246; *James v. Campbell*, 104 U. S. 356.

² *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41.

³ *Dartmouth College v. Woodward*, 4 Wheat. 518.

⁴ 6 How. 507.

⁵ *Backus v. Lebanon*, 11 N. H. 19; *Sunderland Bridge*, 122 Mass. 459. See also §§ 165-168.

⁶ *Alabama*, i. 24; *Arkansas*, xvii. 9; *California*, xii. 8; *Colorado*, xv. 8;

Georgia, iv. 2; *Idaho*, xi. 8; *Illinois*, xi. 14; *Kentucky*, § 195; *Mississippi*, vii. 25; *Missouri*, xii. 4; *Nebraska*, xi. 6; *North Dakota*, vii. 134; *Pennsylvania*, xvi. 3; *Washington*, xii. 10; *West Virginia*, xi. 12; *Wyoming*, x. 9.

⁷ *Thomas v. Wabash, S. L. & P. R.*, 40 Fed. Rep. 126.

⁸ *Binghamton Bridge Case*, 3 Wall. 51; *Mohawk Bridge v. Utica & S. R.*, 6 Paige, 554; *California Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

its subjection to the eminent domain.¹ The distinction between an ordinary franchise and an exclusive one produces important results. An act which will injure the latter may not affect the former.² Further, the exclusive franchise is the more valuable, and therefore exacts a larger compensation for its impairment.

Chancellor Kent was of the opinion, that the grant of a right to construct a work of public utility, a bridge for example, contains an implied promise not to assist a competing work.³ This opinion has not prevailed. The rule is that an exclusive franchise will never be inferred from the mere grant of a privilege, but that the claimant of such a franchise must show a positive intention on the part of the state.⁴ But an exclusive franchise within what Justice Story has termed the "local limits" of the work in question,⁵ that is, the land actually used, seems to be granted by a charter which does not plainly withhold it. For example, where a coach company habitually used the tracks of a street railway company, they were held to invade an exclusive franchise, although it did not appear that the latter company had such a franchise as would enable them to question the paralleling of their line.⁶

§ 84. There is a property in a private contract, and its condemnation may be within range of state necessity, and, consequently, of state power.⁷ Shares of stock may be condemned, when this is a convenient method of acquiring the property which they represent.⁸ Thus the state may authorize a corpora-

¹ *West River Bridge v. Dix*, 6 How. 507; *New Orleans Gas Light Co. v. Louisiana Gas Light Co.*, 115 U. S. 650; *Boston & L. R. v. Salem & L. R.*, 2 Gray, 1; *Red River Bridge v. Clarksville*, 1 Sneed, 176.

² See § 167.

³ *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101. See also Justice Story in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420.

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *W. & B. Bridge v. Wheeling Bridge*, 138 U. S. 287; *Salem & H. Turnpike v. Lyme*, 18 Conn. 451; *Anburn & C. Plankroad v. Douglass*, 9 N. Y. 444; *Syracuse Water Co. v. Syra-*

cuse, 116 N. Y. 167; *Tuckahoe Canal v. Tuckahoe R.*, 11 Leigh, 42; *Raritan & D. R. v. Delaware & R. Canal*, 18 N. J. Eq. 546; *Johnson v. Crow*, 87 Pa. 184; *St. Louis, &c. R. v. St. Louis Un. R.*, 108 Ill. 265; *Lehigh Water Co.'s Appeal*, 102 Pa. 515; *Bush v. Peru Bridge*, 3 Ind. 21. See also *Lehigh Water Co. v. Easton*, 121 U. S. 388.

⁵ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 613. See also *Union Ferry Co.*, 98 N. Y. 139.

⁶ *Citizens' Coach Co. v. Camden Horse R.*, 33 N. J. Eq. 267.

⁷ See § 169.

⁸ See *People v. Kelly*, 76 N. Y. 475; *Kensington Turnpike*, 97 Pa. 260.

tion entrusted with the consolidation of several railroads to condemn the shares of unwilling stockholders.¹ But the effect of the eminent domain upon contracts is, as a rule, merely incidental. They are affected by the condemnation of the property to which they relate.

Private Rights in Public Property.

§ 85. Property requiring special consideration is that which is carved out of the public domain by express or implied grant, or which takes the form of a private right or easement in the public estate. The most important of these easements are that which is held in some States to appertain to land abutting on a street,² and the riparian right.³

§ 86. **State Grants.**— It sometimes happens, that a state grant is asserted in order to fix upon the property in question the stamp of private ownership. If the claim is substantiated the grant is treated in all respects as an ordinary conveyance. The legislature cannot arbitrarily resume it on grounds of public policy,⁴ nor set it aside on the score of corrupt obtainment, where the property has passed into innocent hands.⁵ But because the state cannot surrender its eminent domain,⁶ it follows that property granted may be resumed on payment of compensation.

A grant of state property must be made by the state itself, or its agent duly authorized. Agents in immediate control of such property cannot of their own motion permit its subjection to private rights. Hence a city cannot, without legislative authority, release to private persons land within the lines of a highway,⁷ nor grant to a corporation the use thereof.⁸ One who had drawn water from a state canal for many years, was not permitted to assert a prescriptive right, because the agents in charge of the canal had no authority to grant any permanent interest in its waters.⁹

¹ *Black v. Delaware & R. Canal*, 24 N. J. Eq. 455. See *Lauman v. Lebanon* Val. R., 30 Pa. 42.

² See § 416.

³ See § 91.

⁴ *Terrett v. Taylor*, 9 Cranch, 43.

⁵ *Fletcher v. Peck*, 6 Cranch, 87.

⁶ See § 100.

⁷ *Hoboken L. & I. Co. v. Hoboken*, 36 N. J. L. 540.

⁸ See § 397.

⁹ *Burbank v. Fay*, 65 N. Y. 57.

§ 87. What may be granted by the state? The distinction between property which the state holds by virtue of sovereignty, and that which it holds as in private proprietorship, is noticed elsewhere.¹ Now it has been said that the state cannot part with any property except that which it holds as a private proprietor.² This statement needs explanation. In *Martin v. Waddell*,³ it was held that the state could not abdicate its control over navigable waters, for it would then abdicate its sovereignty.⁴ In *Inhabitants of Charlestown v. County Commissioners*,⁵ Chief Justice Shaw declared that the control of the sovereign over public waters was so absolute that it could fill up a public stream.⁶ These statements are consistent. One is based upon the surrender of public interests into private hands. The other is not predicated upon an abdication of sovereignty, but upon the alteration of a thing over which sovereignty has been exercised in a particular manner,—the obliteration by the public of a trust deemed to be no longer expedient.

The power of the state to deal with land held upon special public trusts, has been carefully examined by the Supreme Court of the United States in the recent case of the *Illinois Central Railroad Co. v. Illinois*.⁷ The State sought to assume control over certain lands underlying a large part of the harbor of Chicago, which it had previously granted to the corporation. The Court, through Justice Field, assumed that the act under which the corporation claimed title was, in its intention, “an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State.” The court found, that “The act, if valid and operative to the extent claimed, placed under the control of the railroad company nearly the whole of the sub-

¹ See § 59.

⁵ 3 Met. 202.

² *Gould v. Hudson River R.*, 6 N. Y. 522, *Edmonds, J.*

⁶ See also *Gough v. Bell*, 22 N. J. L. 441; *Connecticut River Co. v. Olcott Falls Co.*, 65 N. H. 290; *Langdon v.*

³ 16 Pet. 367.

New York, 93 N. Y. 129.

⁴ See also *Bedlow v. Dry Dock Co.*, 112 N. Y. 263.

⁷ 146 U. S. 387.

merged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor, or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbor or to construct as many docks . . . and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods. . . . The inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist." It was decided that the State held the submerged lands in trust for the people, that by the act in question the abdication of this trust was intended, and that the act was, therefore, at the most, a revocable grant, which was in fact revoked by the passage of a repealing act. It was admitted that the State might grant parcels of land underlying navigable waters for uses intended to promote the public convenience. "But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is

interested, that the language of the adjudged cases can be reconciled." Three justices dissented from the decision, and two did not take part in the case. The dissent of the minority was voiced by Justice Shiras, who held that the original grant vested a right of property in the grantee which could be divested only by the right of eminent domain. The distinction drawn by the majority between the power to make special and general grants of submerged lands, was considered untenable. The objection of the minority, that the decision justifies itself merely upon a distinction between a large grant and a small one, does not seem to be well founded. The real justification appears in the fact, that "the act put it within the power of the company to delay indefinitely the improvement of the harbor or to construct as many docks . . . and other works as it might choose, and at such positions in the harbor as might suit its purposes." That is to say, the legislature vested with the power to maintain a harbor and develop it, when, and in such manner, as the public interests might demand from time to time, attempted to transfer the control to a corporation, which in its discretion could hasten or retard development, and which, in its action or inaction, would subserve its own interest, and not necessarily that of the public. There appears to be nothing in the principles enunciated in *The Illinois Central Railroad Company v. Illinois*, which would prevent the state from delegating to an agent the execution of a comprehensive plan for the improvement of a harbor for the benefit of the public, and permitting it to impose reasonable charges for the facilities furnished, for the state would then retain its control over the harbor. Nor is there anything to prevent the state from authorizing the reclamation of the land underlying a harbor, for it would then alter the nature of specific public property. The decision simply declares, that as long as a body of water is a harbor in fact, the state cannot abdicate its trust in respect to it, cannot make its utility depend on the will and ability of a private corporation.

§ 88. The state's grant is to be effectuated, of course, in strict accordance with its terms, but the ordinary rule of conveyancing is reversed. In case of ambiguity, the grant is to be construed

against the grantee,¹ except, it seems, where the grant is made for a valuable consideration.² A lease of land under water to a corporation having perpetual existence, containing words appropriate to the conveyance of a fee, and reserving a yearly rent with right of entry on default, has been so construed as to vest the whole estate in the corporation.³ Where the United States have granted land to a State in order that it may be sold to defray the cost of improving a river, there is no reserved right to flood the land in making the improvement.⁴

If the grant is not express, the intent to grant must be clear.⁵ Where the legislature authorized the condemnation of land supposed to be private property, but which proved to belong to the state, the statute was declared ineffective, as the legislature contemplated the condemnation of private property, not the alienation of public lands.⁶

Where one is in possession of public property under a revocable license, an assertion of dominion over the property by the state or its duly authorized agent is a revocation of the license.⁷ But the licensee may assert a right of property against a corporation acting under an authority which does not contain a revocation of the license.⁸ Thus, assuming that one has the use of public waters under a revocable license, it is a property right as against a corporation whose charter does not empower it to take the waters.⁹

The state may authorize a private corporation to use public property for a purpose not inconsistent with its present use. In such case the interest granted is usually subject to the reserved right to do all things necessary and proper for the maintenance and improvement of the prior use. Thus, where a railroad, gas, or water company are allowed to lay their plant in a street they cannot object because it is injured by an alteration in grade or

¹ *Allegheny v. Ohio & P. R.*, 26 Pa. Ohio St. 157; *Cuckfield Burial Board*, 355. 19 Beav. 153.

² See *Langdon v. New York*, 93 N. Y. ⁶ *Jones v. Tatham*, 20 Pa. 398.

129. ⁷ *Elster v. Springfield*, 49 Ohio St.

³ *Hudson Tunnel Co. v. Atty.-Gen.*, 82.

27 N. J. Eq. 573. ⁸ *Alexandria & F. R. v. Faunce*, 31

⁴ *Zemlock v. United States*, 73 Wis. Gratt. 761.

363. ⁹ *Proprietors of Mills v. Braintree*

⁵ *State v. Cincinnati Central R.*, 37 Water Supply Co., 149 Mass. 478.

other improvement,¹ unless indeed the improvement is unnecessary, or is negligently made.² A water company obliged to move pipes laid in a street, in order to prevent their being injured by an alteration of grade, cannot have redress under a statute which gives compensation to owners of land adjoining a highway.³

§ 89. Whether one in possession of public lands of the United States may assert a right of property on their devotion to a specific public use, and, if so, what the basis of assessment shall be, depends wholly on the nature of the possession. One who has a right of pre-emption, but has not perfected title by payment, is not entitled to compensation.⁴ A homesteader who has not resided upon the land for the number of years necessary to acquire title is yet entitled to compensation for the injury to his possession.⁵ One holding a timber-culture claim should be compensated for an injury to the claim, but not for an injury to the land itself.⁶

§ 90. The custodians of property held to public use may have their right to control it denied by one claiming title by adverse possession or prescription. If the claim is substantiated, the stamp of private ownership is impressed upon the property, and it can be reclaimed to the public use only by purchase or condemnation. According to the principle expressed in the rule, *nullum tempus occurrit regi*, title cannot be gained by adverse possession in property of the state,⁷ unless indeed the state submits itself to the operation of a statute of limitation.⁸ A distinction has been drawn between public land in general, and public property impressed with a specific use, and it has been held that the former may be lost by a long continued adverse possession.⁹

¹ Roanoke Gas Co. v. Roanoke, 88 Va. 810; Middlesex R. v. Wakefield, 103 Mass. 261; Montgomery v. Capital City Water Co., 92 Ala. 361. See also Sture, 32 Minn. 95. See also Knoth v. Barclay, 8 Col. 300.

² Chicago, K. & W. R. v. Hurst, 41 Kan. 740; Hastings & G. I. R. v. Ingalls, 15 Neb. 123.

³ West Phila. Pass. R. v. Philadelphia, 10 Phila. 70; Gas Light, &c. Co. v. St. Mary Abbott's, 15 Q. B. D. 1.

⁴ Jamaica Pond Aqueduct Co. v. Brookline, 121 Mass. 5.

⁵ West. Pacific R. v. Tevis, 41 Cal. 489.

⁶ Burlington, K. & S. R. v. Johnson, 38 Kan. 142; Red River & L. W. R. v. Crooke v. Pendleton, 23 Me. 339; Jackson v. McCall, 10 Johns. 377; Bur-

Now it may be that a continuous possession of public lands for very many years will, under certain circumstances, ripen into a title. But the right of the state to these lands cannot be divested by the mere operation of a statute of limitations.¹

It is held that the protection accorded to the interests of the state should not be extended to the subordinate political corporation in respect to the property which it holds upon local trusts.² Thus, it has been decided that title by adverse possession may be gained in land held to the use of a county poor-house.³

A question upon which there is a decided difference of opinion is whether title by adverse possession can be gained by an encroachment upon a street. It has been held that a street is so far affected by the local character of the municipality that an encroachment is a direct injury to the municipality, not the state. Therefore the former cannot set up the sovereign plea in answer to a claim of title by adverse possession.⁴ But the better rule recognizes the paramount interest of the state in highways, wherever they lie,⁵ and forbids the acquisition of private rights in them by adverse possession.⁶

There is no question but that title by adverse possession may be gained in property held to public use by private corporations, such as railroad companies.⁷

§ 91. **Riparian Rights.** — Where a body of water is public, the question arises whether it is subject to a riparian right, — a private easement appurtenant to the bank. It must be premised

bank *v. Fay*, 65 N. Y. 57. Compare *Burgess v. Gray*, 16 How. 48.

¹ *Lindsey v. Miller*, 6 Pet. 666. See also *Oaksmith's Lessee v. Johnston*, 92 U. S. 343.

² *Mowry v. Providence*, 10 R. I. 52. See also *Oxford Township v. Columbia*, 38 Ohio St. 87.

³ *Evans v. Erie County*, 66 Pa. 222.

⁴ *Fort Smith v. McKibbin*, 41 Ark. 45; *Dudley v. Frankfort*, 12 B. Mon. 610; *Wheeling v. Campbell*, 12 W. Va. 36; *Cincinnati v. Evans*, 5 Ohio St. 594. See also *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232.

⁵ See § 397.

⁶ *Driggs v. Phillips*, 103 N. Y. 77; *Wolfe v. Sullivan*, 133 Ind. 331; *Kopf v. Utter*, 101 Pa. 27; *Lee v. Mound Station*, 118 Ill. 304; *Witherspoon v. Meridian*, 69 Miss. 288; *Sheen v. Stothart*, 29 La. An. 630; *Cross v. Morristown*, 18 N. J. Eq. 305; *Hoboken, L. & I. Co. v. Hoboken*, 36 N. J. L. 540. See also *Hoadley v. San Francisco*, 50 Cal. 265; *Simmons v. Cornell*, 1 R. I. 519; *Barbank v. Fay*, 65 N. Y. 57. See *Coleman v. Thurmond*, 56 Tex. 514.

⁷ *Turner v. Fitchburg R.*, 145 Mass. 433.

that this easement appertains only to the bank of a natural body of water, not of water artificially collected,¹ as a reservoir.²

The riparian right is, in its simplest form, a right to front on navigable water, but does not include the privilege to dock out below high-water mark. It is a right, therefore, to such access as can be enjoyed without the aid of permanent improvements.³ A more complete riparian easement is that which, in addition to the right of access, includes the right to dock out to low-water mark, subject, of course, to reasonable regulation in the interests of navigation.⁴ By the local custom of New Jersey, the owner of land adjoining public waters has an implied license to wharf out or reclaim to low-water mark, and such license when executed is irrevocable.⁵

Wherever the riparian right exists, it includes access to the water from all parts of the property in question, even though access be habitually gained from a particular part only.⁶

§ 92. In certain States it has been held that there is no such thing as a riparian right to access.⁷ In obedience to this rule, it has been held that the State may empower a railroad company to lay their tracks along the fore-shore without compensating the riparian owner for the interference with access to the water.⁸ The doctrine of these cases is flatly opposed to the current of authority both here and in England, but it is a

¹ See *Fox River Flour Co. v. Kelley*, 133 N. Y. 79. See also *Farist Steel Co. v. Bridgeport*, 60 Conn. 278; *Buccleuch v. Met. Bd. of Works*, 5 H. L. 418; *Lyon v. Fishmonger's Co.*, 1 App. Cas. 662; *North Shore R. v. Pion*, 14 App. Cas. 612.

² *Finn v. Providence Gas, etc. Co.*, 99 Pa. 631.

³ *Tinicum Fishing Co. v. Carter*, 61 Pa. 21. See also *Barre v. Fleming*, 29 W. Va. 314.

⁴ *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Comm.*, 18 Wall. 57; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672; *Case v. Toftus*, 39 Fed. Rep. 730; *Diedrich v. Northwest Union R.*, 42 Wis. 248; *Meyers v. St. Louis*, 82 Mo. 367; *Parker v. West Coast Packing Co.*, 17 Or. 510; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; *Bond v. Wool*, 107 N. C. 139; *Rumsey v. New York & N. E. R.*

⁵ *Bell v. Gough*, 23 N. J. L. 624; *Stevens v. Paterson & N. R.*, 34 N. J. L. 532.

⁶ *Buccleuch v. Met. Bd. of Works*, L. R., 5 H. L. 418.

⁷ *Austin v. Rutland R.*, 45 Vt. 215; *Eisenbach v. Hatfield*, 2 Wash. 236; *Tomlin v. Dubuque, B. & M. R.*, 32 Iowa, 106.

⁸ *Stevens v. Paterson & N. R.*, 34 N. J. L. 532; *Gould v. Hudson River R.*, 6 N. Y. 522.

notable example of the slow crystallization of the common law of England, that only within a few years has the riparian right been definitely established, and, to attain this result, the House of Lords have twice reversed the decisions of inferior courts.¹

In New York, the rule in *Gould v. Hudson River Railroad Company*² long received recognition, though its correctness was sometimes doubted. But in a recent case in a federal court a riparian owner denied the right of the city of New York to wharf out in front of land which had been granted to him as far as high-water mark. His position was sustained on the ground that the rule in *Story v. New York Elevated Railway Company*,³ that a public grant of land on a street carries with it an easement of access, is equally applicable to a grant of land on a waterway.⁴ The Court of Appeals have very lately definitely overruled the Gould case, and declared that there appertains to riparian land the right to wharf out to the navigable part of the water, subject to the public rights in navigation.⁵

Laying aside all question in respect to a riparian right attaching to the ownership of the natural bank, it is settled that where a wharf is erected under a valid grant from the State an easement of access attaches to it.⁶

EXEMPT PROPERTY.

§ 93. Although all property is subject to the right of eminent domain, it may happen that one may be in a position to avail himself of a statute, or a conclusion of law, which exempts his property from condemnation for the use in question. An exemption is not necessarily inferred from the fact that the property is reserved by the state for a particular use, where the use is not distinctly governmental. Thus, land may be condemned, although set apart as an Indian Reservation,⁷ or reserved from

¹ *Buckleuch v. Met. Bd. of Works*, L. R., 5 H. L. 418; *Lyon v. Fishmongers Co.*, 1 App. Cas. 662.

² 6 N. Y. 522.

³ 90 N. Y. 122. See § 404.

⁴ *Van Dolsen v. New York*, 17 Fed. R. 817. See also *Kane v. New York El. R.*, 125 N. Y. 164.

⁵ *Rumsey v. New York & N. E. R.*, 133 N. Y. 79. See *Kerr v. West Shore R.*, 127 N. Y. 269.

⁶ *Langdon v. New York*, 93 N. Y. 129; *Williams v. New York*, 105 N. Y. 419.

⁷ *Cherokee Nation v. South. Kansas R.*, 135 U. S. 641; *Wadsworth v. Hydraulic Ass'n*, 15 Barb. 83.

sale by the Constitution on account of its adjacency to salt springs.¹ Although tide flats cannot be reclaimed by the owner, without license from the state, they may be condemned by the local authorities for a cemetery without special authority.²

§ 94. **Statutory Exemption.** — The state cannot irrevocably relieve property from subjection to the eminent domain,³ but it may find it expedient to annex to a grant of the power the condition that property of a particular description shall not be condemned.⁴

Where a statutory prohibition against taking a certain sort of property is not absolute, but is conditioned upon inability to suitably locate the undertaking elsewhere, the condition is to be liberally construed in favor of the public work.⁵

Assuming that the state may agree not to condemn specific property,⁶ the exemption laws in question are not to be treated as agreements. These laws create general exemptions, are based on mere considerations of policy, and may be freely repealed.

§ 95. There are eminent domain statutes which exempt certain structures from condemnation, especially dwellings. A billiard saloon attached to, and used in connection with, a hotel is part of a dwelling-house.⁷ It has been held that a dwelling-house does not include the curtilage,⁸ but the better rule protects such part of the curtilage as is necessary to the enjoyment of the dwelling, as distinguished from that which merely adds to its desirability or convenience.⁹ The fact that the construction of a railroad through the curtilage will impair access to the dwelling is not material.¹⁰ The platform of a railroad station is not necessarily within the purview of a statute prohibiting the laying out of roads through buildings.¹¹ If a railroad has been

¹ *Parnelee v. Oswego & S. R.*, 7 Barb. 599.

² *Wyman v. County Comm.*, 157 Mass. 55.

³ See § 100.

⁴ *Hays v. Briggs*, 74 Pa. 373.

⁵ *Cummins v. Shields*, 34 Ind. 154.

⁶ See § 100.

⁷ *State v. Troth*, 36 N. J. L. 422.

⁸ *Wells v. Somerset & K. R.*, 47 Me. 345.

⁹ *Swift's Appeal*, 111 Pa. 516; *Damon's Appeal*, 119 Pa. 287.

¹⁰ *Lyle v. McKeesport & B. V. R.*, 131 Pa. 437.

¹¹ *New York & L. B. R. v. Drummond*, 46 N. J. L. 644.

built on a strip narrower than the maximum allowed, and a building is afterwards erected close to the track, the owner may resist the widening of the right of way to the original limit, by pleading a statute which forbids the company to take a building without consent.¹

A structure must be in existence at the time the initial steps are taken for the construction of the public work, in order to be within the statutory protection.² Where dwellings occupied by owners are exempted by statute, the occupation must be *bona fide*.³

Statutes forbidding the forced location of a public work within a certain distance of a dwelling, are occasionally submitted for judicial construction.⁴ It has been held that a statute, prohibiting the location of a railroad within sixty feet of a dwelling without the consent of the owner, does not forbid a location within sixty feet upon land belonging to another person.⁵ A prohibition against the location of a cemetery within a certain distance of a dwelling, is not violated by the condemnation for this purpose of land on which a dwelling stands.⁶

§ 96. An exemption of improved land has been construed so as to include land fenced.⁷

It is frequently enacted that gardens, orchards, and the like shall not be condemned, especially where the power is exercised for the laying out of highways. It is not sufficient that the land in question is enclosed within the fence of a garden, it must be cultivated.⁸ So, it has been held that, in claiming exemption for an orchard, it must be shown that there will be an actual interference with the trees.⁹ But the protection of the statute should extend over as much ground adjacent to the cultivated part of a garden, and the trees in an orchard, as is necessary to their care and use.¹⁰

¹ Alabama Great Southern R. v. Gilbert, 71 Ga. 591.

² Carris v. Comm., 2 Hill, 443; State v. Waldron, 17 N. J. L. 368.

³ Hagner v. Pennsylvania, S. V. R., 154 Pa. 475. See also Morris v. Schallsville, etc. R., 4 Bush, 448.

⁴ Chesapeake & O. R. v. Pack, 6 W. Va. 397.

⁵ Richmond & Y. R. R. v. Wicker, 13 Gratt. 375.

⁶ Crowell v. Londonderry, 63 N. H. 42.

⁷ Jackson v. Rankin, 67 Wis. 285.

⁸ People v. Comm., 57 N. Y. 549.

⁹ Snyder v. Trumbour, 38 N. Y. 355.

¹⁰ Seymour v. State, 19 Wis. 240.

Where a flowage act prohibits interference with a mill site unless it has been abandoned, abandonment through non-user may be inferred,¹ but it is a question of fact for the jury.² Where an artificial provision for water is protected from condemnation, a body of water collected for supply is meant, not water collected for mill purposes.³

Although railroad property enjoys a certain protection, for the reason that it is already devoted to public use,⁴ there are statutes which specifically protect such property from condemnation in the absence of direct authorization. In these statutes a "roadbed" means the tracks, and sufficient space to allow the movement of trains, but does not include the slope of an embankment.⁵

§ 97. **Exemption of Property by Implication.**—No rule of the eminent domain is more firmly established than this. Property already devoted to public use is so far favored by the state that it cannot be taken in furtherance of a new use, unless the legislature plainly intends it to be.⁶ The evidence of legislative intention, and the question as to the affecting of the prior use, are considered elsewhere.⁷ The inquiry here is simply as to what property comes under this head.

It is not necessary that the property should be actually acquired by the right of eminent domain in order to impress it with the stamp of public utility.⁸ The test is the obligation to hold the property to public use,—an obligation imposed by law. The fact that a corporation voluntarily assumes public functions, such as those of a common carrier, does not impress its property

¹ *Curtiss v. Smith*, 35 Conn. 156.

² *McArthur v. Morgan*, 49 Conn. 347.

³ *Bass v. Ft. Wayne*, 121 Ind. 389.

⁴ See §§ 176-180.

⁵ *Mobile & G. R. v. Ala. Midland R.*, 87 Ala. 520.

⁶ *Pennsylvania R. Appeal*, 93 Pa. 150; *Springfield v. Connecticut River R.*, 4 Cush. 63; *Boston & M. R. v. Lowell & L. R.*, 124 Mass. 368; *Boston & A. R.*, 53 N. Y. 574; *New York Cent. & H. R. R.*, 77 N. Y. 248; *People v.*

Thompson, 98 N. Y. 6; *Wheeling Bridge v. Wheeling & B. Bridge*, 34 W. Va. 155; *Milwaukee & S. P. R. v. Faribault*, 23 Minn. 167; *Atlanta v. Cent. R.*, 53 Ga. 120; *Railroad Co. v. Belle Centre*, 48 Ohio St. 273. See also *Bottomly v. Chism*, 102 Mass. 463.

⁷ See §§ 176-180.

⁸ *Providence & W. R.*, 17 R. I. 324; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359. See also *Eldridge v. Smith*, 34 Vt. 484. See *Alexander Ave.*, 17 N. Y. Supp. 933.

with a public character.¹ A cemetery owned by a church corporation is not property devoted to public use.² A market company, enjoying simply the franchise to be a corporation, and maintaining a market not open to the public as of right, cannot require evidence of direct authority to condemn their property.³ Property within the implied exemption must be such as the corporation could have condemned.⁴ Hence, a railroad company cannot object to the condemnation of a wharf, where they hold it in their private not their public capacity.⁵

The fact that certain property is "affected with a public interest" within the principle of *Munn v. Illinois*,⁶ does not, it appears, enable its owners to take advantage of the rule. Thus, land used by a gas company which have not the right to condemn, is not within the purview of the rule, although the corporation is of a public character.⁷

It would seem that land acquired by the right of eminent domain for such a purpose as a private road or lateral railroad, is not entitled to the same consideration as property devoted to an undertaking of more marked publicity.

§ 98. A corporation cannot claim exemption for land, the possession of which is not necessary for the purposes of its incorporation.⁸ Thus protection will not be accorded to land used for storing lumber while a bridge is being repaired.⁹

The fact that the property in question is not in actual public use will frequently warrant its condemnation without special authority.¹⁰ But while a corporation cannot condemn land for

¹ *New York, L. E. & W. R.*, 99 N. Y. 413; *Grand Rapids v. Grand Rapids & I. R.*, 66 Mich. 42; *Peoria, P. & J. R. v. Peoria & S. R.*, 66 Ill. 174. See also *Old Colony R. v. Farmington Water Co.*, 153 Mass. 561; *North Carolina R. v. Carolina Cent. R.*, 83 N. C. 489.

² *Board of Street Opening*, 133 N. Y. 329. See *Balch v. County Comm.*, 103 Mass. 106.

³ *Market Co. v. Phila. & R. R.*, 142 Pa. 580.

⁴ See *Railroad Comm.*, 83 Me. 273. But see *Barre R. v. Montpelier & W. R. R.*, 61 Vt. 1.

⁵ *Iron R. v. Ironton*, 19 Ohio St. 299.

⁶ 94 U. S. 113. See also § 18.

⁷ *New York Cent. & H. R. R. v. Met. Gas Light Co.*, 63 N. Y. 326.

⁸ *Rochester Water Comm.*, 66 N. Y. 501.

⁹ *Wheeling Bridge v. Wheeling & B. Bridge*, 34 W. Va. 155.

¹⁰ *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659; *St. Paul & N. R.*, 34 Minn. 227; *Colorado Eastern R. v. Union Pacific R.*, 41 Fed. Rep. 293. See also *Mobile & G. R. v. Alabama Midland R.*, 87 Ala. 501.

speculative purposes, nor to forestall competition, it may, within certain limits, condemn and hold land with an eye to the probable expansion of business.¹ Such property has been protected under the rule.² Thus, it was held that land used by a railroad company as a yard, could not be crossed by the right of way of another company, although the yard was confessedly larger than the present needs of the road demanded, and, by reason of its location between a hill and a river, afforded the most convenient route for the second road.³ On the other hand, a railroad company have been allowed to condemn land graded by another company for the possible use of a second track. The court held it a public convenience that railroads running near each other should be laid side by side.⁴

Where a corporation has perfected its location,⁵ the land is devoted to public use within the meaning of the rule, although the work is not actually begun.⁶

¹ See § 186.

² See *Occum Co. v. Sprague Man. Co.*, 35 Conn. 496.

³ *Pittsburgh Junction R.'s Appeal*, 122 Pa. 511. See also *Sharon R.'s Appeal*, 122 Pa. 533.

⁴ *New York H. & N. R. v. Boston, H. & E. R.*, 36 Conn. 196.

⁵ See §§ 182, 183.

⁶ *Rochester, H. & L. R. v. Erie R.*, 110 N. Y. 128. See also *Suburban & C. R. v. New York*, 128 N. Y. 510; *Sioux City & D. R. v. Chicago, M. & S. P. R.*, 27 Fed. Rep. 770.

CHAPTER V.

THE AUTHORITY TO CONDEMN.

§ 99. The right of eminent domain is entrusted to the legislature, whose control is supreme except as it may be qualified by constitutional declaration.¹ The purpose of this chapter is to determine the nature of the trust upon which the power is held, the agencies through which it is exerted, and the sufficiency of the statutory authority.

§ 100. The state cannot surrender a sovereign power. The operation of this principle is readily determined in respect to the police power. A legislative act, mitigating or abolishing a given manifestation of this power, cannot create a vested right in the continuance of the new condition.² The power of a legislature to grant a particular exemption from taxation, in the absence of constitutional prohibition, is so well settled,³ that any objection to its exercise must be based on economic grounds. The legislature does not, strictly speaking, surrender a sovereign power, for the grant is a contract, and, as such, may be condemned if the public interests demand its revocation. But the effect of a tax exemption is to give a private person that which cannot attach to the police power,—a vested interest in the suspension of an arm of sovereignty.

What of the eminent domain? It follows from the general principle of the indestructibility of sovereign power that the state cannot deprive itself of the eminent domain over any property within its jurisdiction.⁴ But is an agreement not to

¹ *Lake Shore & M. S. R. v. Chicago* U. S. 746. See also *Peru v. Gleason*, 91 & W. I. R., 97 Ill. 506. Ind. 566.

² *Metropolitan Board v. Barrie*, 34 N. Y. 656; *Railroad Co. v. County Comm.*, 79 Me. 386; *Butchers' Union, etc. Co. v. Crescent City, etc. Co.*, 111

³ *New Jersey v. Wilson*, 7 Cranch, 164.

⁴ See *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Lang-*

take particular land for a particular use unconstitutional, or is it, like a tax exemption, a valid contract which may itself be condemned if need be? In *Twenty-second Street*,¹ a statute declaring that a street should not be opened through a cemetery without consent, was held to create a contract.² A statute of similar import has been construed to prevent the condemnation of the land for a street by a city acting under a general authority, upon the familiar principle that special authority must be shown to warrant the condemnation of land already in public use,³ but the court intimated that even if special authority had been given, the agreement would not be considered a valid contract.⁴ The better view seems to be that taken in the *Twenty-second Street* case. Where the state grants an exclusive franchise to build a bridge within certain limits⁵ it, in effect, suspends its right of eminent domain within those limits. Now there does not seem to be a radical difference between agreeing not to exercise the power in order to confer freedom from competition, and agreeing not to condemn property itself, provided, of course, that a consideration in the shape of some public benefit appear. But an agreement not to condemn must be express. Hence the state does not bind itself not to condemn a franchise at once, because it has reserved the right to purchase it at a specified time,⁶ or has even agreed not to purchase until the expiration of a certain period.⁷ A covenant for quiet enjoyment in a deed from a city is not a promise that the land will not be condemned.⁸

Whatever opinion may be held as to the competency of the state to suspend its eminent domain, it is unquestionably true that agents to whom the power is granted cannot, of their own motion, agree not to exercise it.⁹ A municipal corporation can-

don v. New York, 93 N. Y. 129, 161;
State v. Hudson Tunnel Co., 38 N. J. L.
 548; *Wellington's Petition*, 16 Pick.
 87; *Eastern R. v. Boston & M. R.*, 111
 Mass. 125; *Grand Rapids v. Grand*
Rapids & I. R., 66 Mich. 42. Compare
Illinois & M. Canal v. Chicago & R. I. R.,
 14 Ill. 314.

¹ 102 Pa. 108.

² See also *Grand Rapids v. Grand*
Rapids & I. R., 66 Mich. 42, — *Camp-*
bell, J.

³ See § 97.

⁴ *Hyde Park v. Cemetery Associa-*
tion, 119 Ill. 141.

⁵ See § 83.

⁶ *Backus v. Lebanon*, 11 N. H. 19.

⁷ *Lock Haven Bridge v. Clinton*
County, 157 Pa. 379.

⁸ *Brimmer v. Boston*, 102 Mass. 19.

⁹ See *Ayr Harbour Trustees v.*
Oswald, 8 App. Cas. 623.

not contract not to open a street in a particular place.¹ A railroad company obtained a tract of land, in consideration of their promise that no more land of the grantor should be condemned. It was held that, while they had not surrendered the power to condemn, they could not exercise it until they had paid just compensation for the land granted.² The fact that a railroad company have purchased a right of way across a tract, does not prevent them from condemning another and more suitable way over it.³

§ 101. It is well settled that legislative power cannot be delegated, but must be exercised by the legislature, subject to such executive approval as the constitution may require. A statute must express a complete law, not a suggested law to be ratified by the people as a whole, or by persons specially interested.⁴ But a distinction has been drawn between ratification as necessary to the existence of a law, and ratification as necessary to its operation in a particular case.⁵ Thus, a municipal charter may be a complete legislative act, and yet be inoperative without the assent of the community interested.⁶ So, it has been held that the legislature may condition the operation of a local option law upon the assent of the people of a locality, without abdicating the legislative function.⁷ The distinction is, after all, but a manifestation of the general rule that a legislative act may be complete, although its operation be conditioned on a contingency.⁸

The eminent domain is well within the rule against the delegation of legislative power. One may resist the taking of his property, unless the initial force of the effort to expropriate is legislative.⁹

¹ *Grand Rapids v. Grand Rapids & I. R.*, 66 Mich. 42. See also *Gozler v. Georgetown*, 6 Wheat. 593.

² *Cornwall v. Louisville & N. R.*, 87 Ky. 72. See *Chicago & W. I. R. v. Illinois Cent. R.*, 113 Ill. 156.

³ *Eel River & E. R. v. Field*, 67 Cal. 429.

⁴ *Barto v. Himrod*, 8 N. Y. 483.

⁵ See *New York El. Ry.*, 70 N. Y. 327.

⁶ *Paterson v. Society for Useful Man.*, 24 N. J. L. 385, *Smith v. McCarty*, 56 Pa. 359.

⁷ *Paul v. Gloucester County*, 50 N. J. L. 585.

⁸ *State v. Parker*, 26 Vt. 357; *People v. Fire Association*, 92 N. Y. 311; *Locke's Appeal*, 72 Pa. 491.

⁹ *Brigham v. Edmands*, 7 Gray, 359; *Poughkeepsie Bridge Co.*, 108 N. Y. 483.

§ 102. Agreeably to the distinction referred to in the preceding section, the power to determine the occasion for the exercise of the eminent domain need not be, and in fact is not usually, exerted by the legislature. It may be conferred upon an impartial tribunal such as a court, a jury, or commissioners.¹ The power may be granted to the agents or parties interested in furthering the public use; for example, to a town meeting,² a public corporation, as where a city is authorized to lay out streets,³ or a private corporation,—a grant notably illustrated in general railroad acts.⁴

The competency of the legislature to invest private grantees of the eminent domain with the power to determine the necessity for its exercise, is firmly established by the decisions. But the practical result is not always quite satisfactory. Assuming, for example, that transportation is of such public interest as to warrant the exercise of the eminent domain in favor of a railroad, and that the necessity of a railroad from A to B is a proper subject for legislative determination, does it follow that the legislature exercises a just discretion in enacting a general railroad law, under which the number of necessary railroads between A and B depends wholly upon the judgment of private corporations? An affirmative answer is returned, although reluctantly in some cases,⁵ and seems to be a logical outcome of the doctrine that matters of expediency are wholly within the competency of the legislature.

There is no objection to conditioning the exercise of the eminent domain upon the action of private persons. Thus, the petition of persons within a defined class is often made the basis of proceedings to lay out a highway.⁶ The construction of a public undertaking may be conditioned on the assent of a certain proportion of property owners affected,⁷ or upon the assent of a majority of the electors within a county.⁸

¹ Union El. R., 113 N. Y. 275.

² Reed v. Acton, 117 Mass. 384.

³ Chicago, R. I. & P. R. v. Lake, 71 Ill. 333; State v. Englemann, 106 Mo. 628.

⁴ National Docks R. v. Cent. R., 32 N. J. Eq. 755.

⁵ See Giesy v. Cincinnati, W. & B. R., 4 Ohio St. 308; National Docks R. v. Central R., 32 N. J. Eq. 755.

⁶ See § 330.

⁷ See § 330.

⁸ Noonan v. County of Hudson, 52 N. J. L. 398.

EXERCISE OF THE POWER BY AGENTS.

§ 103. As it is not within the competency of the legislature to execute its laws, it must entrust the execution of the eminent domain to agents. There is nothing, however, to prevent the legislature from condemning specific property by force of the statute, leaving the necessary details to be carried out by agents,¹ but it usually treats the selection of property as a detail beyond its competency in fact.

The personality of the agent is, in some respects, of little more than theoretical importance.² It is the undertaking with which the state is concerned, not the particular person by whose agency it may be accomplished. The particular agent need not be named in the grant, nor even be in existence at the passage of the act, as witness the general railroad acts granting the eminent domain to all who comply with their terms. But where a corporation claims the power to condemn by virtue of a general law, it must appear that the claimant answers to the statutory description of corporations entitled.³

It has been said that a private corporation having the right to condemn is the *locum tenens* of the state. This characterization is too strong. Such a corporation promotes an undertaking of public interest, it is true, but not disinterestedly. It enters upon its work with the controlling idea of private profit which stimulates all commercial enterprises. The better opinion is that the corporation does not stand in the place of the state,⁴ although it may be regarded as, in a broad sense, the agent of the state.

§ 104. A grant of the eminent domain imports a personal trust in this, that the power cannot be exercised by the employees or agents of the grantee unless this practice is authorized by the legislature. This does not mean that mere ministerial acts must be performed under the immediate direction of the grantee, but that the occasion for condemnation shall not be determined by subordinates. In one case the line between discretionary

¹ See § 172.

² See *Abbott v. New York & N. E. R.*, 145 Mass. 450.

³ See § 326.

⁴ *Presbyterian Society v. Auburn & N. H. R.*, 21 Conn. 294.

and ministerial duties may be readily drawn. The location of the undertaking is clearly a duty of the first kind, and the necessary land should be condemned by the corporation, not by a contractor or employee.¹ It has been held, however, that where the line of a railroad has been definitely selected, the corporation may authorize a contractor to condemn the property in its name.² According to some authorities, the engineers of a corporation, or contractors engaged to construct the works, may determine the necessity for the taking of materials.³ In any event, a corporation, which has received the benefit of a contractor's action in the premises, cannot plead his want of authority in defence of a claim for compensation.⁴ But the action of a contractor, who of his own motion takes property not needed, is not binding upon the corporation.⁵

Where a corporation, having power to condemn, enters into a contract which cannot be fulfilled owing to the incapacity of the other party to condemn necessary property, it may exert the power in order to complete the contract, provided, of course, the use is public, and within the scope of its charter.⁶ A city made a contract with a corporation for a supply of water. The corporation could not fulfil its agreement, because it was unable to acquire necessary property. It was held that the city could exert its charter power to condemn for a water supply, in order to complete the contract.⁷

§ 105. The state is not restricted to granting the eminent domain as a privilege. It may compel its exercise in certain cases. As a rule, this power is exercised over political corporations to which are assigned such parts of the state's work as can be best furthered by local agencies. The right of compulsion may be

¹ See *Williamsport & N. R. v. Philadelphia & E. R.*, 141 Pa. 407; *St. Peter v. Denison*, 58 N. Y. 416.

² *Buchanan County Bank v. Cedar Rapids, I. & N. R.*, 62 Iowa, 494.

³ *Vermont Cent. R. v. Baxter*, 22 Vt. 365; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Bliss v. Hosmer*, 15 Ohio, 44. Compare *Lyon v. Jerome*, 26 Wend. 485; *Schmidt v. Densmore*, 42 Mo. 225.

⁴ *Bloomfield R. v. Grace*, 112 Ind. 128.

⁵ *Waltemeyer v. Wisconsin, I. & N. R.*, 71 Iowa, 626. See *Eaton v. European & N. A. R.*, 59 Me. 520; *Hughes v. Railroad Co.*, 39 Ohio St. 461; *Standish v. Liverpool*, 1 Drew, 1.

⁶ *Tenbroeck v. Sherrill*, 71 N. Y. 276.
⁷ *Slingerland v. Newark*, 54 N. J. L. 62.

exerted as well in respect to private corporations enjoying the eminent domain. Thus, where two railroads and a street intersect at grade, the legislature may compel the several corporations interested to abate the nuisance by erecting a bridge and re-locating the tracks.¹ In *Worcester v. Norwich & Worcester Railroad Company*,² the defendants questioned a statute requiring them to unite with other railroad companies at a single depot, on the ground that they would be obliged to extend their line, and condemn private property. The court said: "One of the most obvious reasons for reserving to the legislature the right to alter and amend such charters is to enable it to compel an unwilling corporation to perfect and extend its connections with other railroads as the convenience of the public may from time to time require." The question suggests itself as to the limits of this reserved power. In the opinion quoted from, the court denied the inference that the company could be compelled to extend the line to any point within the State. This qualification is just. A private corporation should be compelled to condemn, not merely because the public interests would be promoted by its action, but because they are harmed by its inaction.³

As a private person cannot compel the maintenance of a public use because of its benefit to him,⁴ so he cannot compel the state or its agent to condemn. Hence an agreement not to discontinue proceedings to condemn, made by a public officer, cannot be enforced, for the officer cannot part with his discretionary power.⁵

§ 106. *Who may be Agents?* — The legislature may exercise its discretion in choosing agents, unless restrained by a constitutional provision.⁶ A constitutional prohibition against a grant of privileges to a special class is not violated by a grant of the eminent domain to such natural gas companies only as are organized to supply gas within the State.⁷

¹ *Woodruff v. Catlin*, 54 Conn. 277.

² 109 Mass. 103.

³ See *Zabriskie v. Hackensack & N.Y. R.*, 18 N. J. Eq. 178.

⁴ See § 217.

⁵ See *Martin v. Brooklyn*, 1 Hill, 545.

⁶ *Townsend's Case*, 39 N. Y. 171.

⁷ *Consumer's Gas Co. v. Harless*, 131 Ind. 446.

In certain States foreign corporations cannot receive the eminent domain.¹ A foreign corporation cannot cure this disability by procuring a domestic corporation to condemn for its benefit.² But a foreign corporation, consolidating under the local law with a domestic one, may receive the power.³ In the absence of a constitutional prohibition, the eminent domain may be granted to a foreign corporation as an incident to the privilege of transacting business within the state.⁴ It has been held that this can be done, although the charter of the foreign corporation does not expressly authorize it to do business outside of its own State.⁵

There is no objection on principle to the selection of individuals as agents, and they occasionally receive the power.⁶

Corporations, political and private, are the agents usually employed, for undertakings of public concern generally demand corporate rather than individual ability.

§ 107. **Qualifications of Agents. — Corporate Organization.** — If a corporation is not organized in conformity with the statute its attempt to condemn may be resisted.⁷ This proposition is not controverted. But there is a difference of opinion, in some respects, as to what is a sufficient organization, or a sufficient proof of organization, to prevail against the objection of the owner that corporate powers are unlawfully assumed. Condemnation may be resisted on the ground that there is no proof of corporate existence under the law. Thus, it was held in an often cited case, that the company must show a certificate, and public

¹ Ark. Const. xii. 11; Neb. Const. xi. 8 (Railroad Corporations); *Trester v. Missouri Pacific R.*, 23 Neb. 242.

² *Koenig v. Chicago, B. & Q. R.*, 27 Neb. 699. Compare *Lower v. Chicago, B. & Q. R.*, 59 Iowa, 563.

³ *State v. Chicago, B. & Q. R.*, 25 Neb. 156; *St. Paul & N. R.*, 36 Minn. 85.

⁴ *New York & E. R. v. Young*, 33 Pa. 175; *State v. Sherman*, 22 Ohio St. 481; *Townsend's Case*, 39 N. Y. 171; *Abbott v. New York & N. E. R.*, 145 Mass. 450; *Gray v. St. Louis & S. R.*, 81 Mo. 126; *Baltimore & O. R. v. Pittsburgh, W. & K. R.*, 17 W. Va. 812.

⁵ *Dodge v. Council Bluffs*, 57 Iowa 560.

⁶ *Calking v. Baldwin*, 4 Wend. 667; *Day v. Stetson*, 8 Me. 365; *Young v. Buckingham*, 5 Ohio, 485; *Moran v. Ross*, 79 Cal. 159; *Ash v. Cummings*, 50 N. H. 591. See also *Morgan v. Louisiana*, 93 U. S. 217; *Lawrence v. Morgan's L. & T. R.*, 39 La. An. 427, *Coo v. Columbus P. & I. R.*, 10 Ohio St. 372. Compare *Finney v. Somerville*, 80 Pa. 59; *Mahoney v. Spring Val. Water Co.*, 52 Cal. 159; *Moran v. Ross*, 79 Cal. 159, dissenting opinion of Beatty, C. J.

⁷ *St. Joseph & I. R. v. Shambagh*, 106 Mo. 557.

record of their organization, in strict compliance with the law.¹ But an averment that a corporation is duly organized, is not sufficiently answered by a bare denial.² Where the record does not show that the organization has been completed by the election of directors, proof of such election has been admitted.³

It has been held that condemnation proceedings of a *de facto* corporation cannot be questioned by an owner.⁴ In other decisions it has been ruled that a *de facto* corporation cannot condemn, but that the agent must be a corporation *de jure*.⁵

According to the Lands Clauses Act, the whole sum needed to defray the cost of the undertaking must be subscribed before the compulsory powers can be exercised.⁶ In this country the English rule is not needed where compensation precedent is required. Nor does it obtain, necessarily, where compensation subsequent is permitted. In some cases the courts have found that a requirement of full stock subscription is not imposed for the owner's benefit, and that, therefore, proof of subscription is not a condition precedent to condemnation.⁷ In New York, a railway corporation must have a certain percentage of its stock subscribed for before it can condemn, but it has not been decided whether an owner can question the power of subscribers to make their subscriptions.⁸

§ 108. **Transfer of the Eminent Domain.** — The grantee of the eminent domain cannot, under any circumstances, transfer it to a corporation incapable of receiving an original grant.⁹ Nor can a transfer be made to a competent corporation except with the

¹ *Atlantic & O. R. v. Sullivan*, 5 Ohio St. 276.

² *New York, L. & W. R.*, 99 N. Y. 12.

³ *Powers v. Hazleton & L. R.*, 33 Ohio St. 429.

⁴ *McAuley v. Columbus, C. & I. C. R.*, 83 Ill. 348; *Peoria & P. R. v. Peoria & F. R.*, 105 Ill. 110; *Ward v. Minnesota & N. W. R.*, 119 Ill. 287; *Nat'l Docks R. v. Central R.*, 32 N. J. Eq. 755; *Reisner v. Strong*, 24 Kan. 410. See also *Atty.-Gen. v. Stevens*, 1 N. J. Eq. 369; *New Cent. Coal Co. v. Georges Creek, C. & I. Co.*, 37 Md. 537; *Clarke v. Chicago, K. & N. R.*, 23 Neb. 613. See *People v. County Court*, 28 Hun, 14.

⁵ *New York Cable Co. v. New York*, 104 N. Y. 1; *Broadway, etc. R.*, 73 Hun,

⁷ See also *Niemeyer v. Little Rock Junct. R.*, 43 Ark. 111.

⁶ Sect. 16. *Guest v. Poole & B. R.*, L. R. 5 C. P. 553.

⁷ *Henry v. Centralia & C. R.*, 121 Ill. 264. See *Kean v. Driggs Drainage Co.*, 45 N. J. L. 91.

⁸ *Rochester, H. & L. R.*, 110 N. Y. 119.

⁹ *Stewart's Appeal*, 56 Pa. 413. See *Barker v. Hartman Steel Co.*, 129 Pa. 551; *Fanning v. Osborne*, 102 N. Y. 441.

consent of the legislature.¹ The prohibition cannot be evaded by condemning property for the use of another corporation.²

The legislature may consent expressly to the transfer, as when it authorizes a corporation to sell or lease to another, or to consolidate with another.³ Where a transfer is made without consent, it may be legitimated by an express ratification, or by recognition evidenced in statutes.⁴ The action of the legislature in these cases may be viewed either as effecting a new grant of power, or continuing an old one.⁵

Where corporate property and franchises are transferred by judicial sale the franchise to be a corporation does not pass, but the right to condemn, whether considered a franchise or not, passes as a valuable right necessary to the full enjoyment of the property,⁶ and this has been approved where the purchaser is not a corporation.⁷

Strictly speaking, the appointment of a receiver for an insolvent corporation does not transfer the right to condemn, for corporate existence is preserved during his possession. In such case the receiver may condemn for the purpose of completing an undertaking already begun,⁸ and, it would seem, of maintaining the efficiency of a completed work.

Where a corporation, having the right to condemn, lawfully leases to another, the lessee should exercise the power in the name of the lessor.⁹ If the power to condemn is transferred by consolidation, proceedings should be instituted in the consoli-

¹ *Abbott v. New York & N. E. R.*, 145 Mass. 450. See also *Pittsburgh & C. R. v. Bedford & B. R.*, 81½ Pa. 104; *Coe v. Columbus, P. & I. R.*, 10 Ohio St. 372.

² *Swinney v. Ft. Wayne, M. & C. R.*, 59 Ind. 205; *Platt v. Pennsylvania Co.*, 43 Ohio St. 228. See *Coe v. Delaware, L. & W. R.*, 34 N. J. Eq. 266; *Mahoney v. Spring Val. Water Co.*, 52 Cal. 159.

³ *California Cent. R. v. Hooper*, 76 Cal. 404. See also *Boston & P. R. v. Midland R.*, 1 Gray, 340.

⁴ *Abbott v. New York & N. E. R.*, 145 Mass. 450.

⁵ *Abbott v. New York & N. E. R.*, 145 Mass. 450.

⁶ *North Carolina R. v. Carolina Cent. R.*, 83 N. C. 489. See also *Morgan v. Louisiana*, 93 U. S. 217; *Eldridge v. Smith*, 34 Vt. 484.

⁷ *Lawrence v. Morgan's L. & T. R.*, 39 La. An. 427. See *Coe v. Columbus, P. & I. R.*, 10 Ohio St. 372.

⁸ *Moran v. Lydecker*, 27 Hun, 582. See *Lehigh Coal & Nav. Co. v. Cent. R.*, 35 N. J. Eq. 379.

⁹ *Kip v. New York & H. R.*, 67 N. Y. 227; *New York, L. & W. R.*, 99 N. Y. 12; *Chicago & W. I. R. v. Illinois Cent. R.*, 113 Ill. 156. See also *Deitrichs v. Lincoln & N. W. R.*, 13 Neb. 361; *Worcester v. Norwich & W. R.*, 109 Mass. 103.

dated name, and it has been held that pending proceedings may be completed in such name.¹

§ 109. **The Statutory Authority.** — As the legislature makes known its will only by statute, a corporation wishing to condemn must derive its whole authority from its charter. But, agreeably to the general rule of law, the authority need not be based on a single statute, but may be derived from acts *in pari materia*.² Where a bridge company are authorized to condemn according to the procedure prescribed in a general railroad act, they cannot assume a power of relocation granted by the act, for this is not a matter of procedure.³

A grant of the eminent domain must be expressed or necessarily implied, for the legislative intention to divest a man of his property must clearly appear.⁴ Where the intention to grant is disclosed, the statute must be construed with strict regard to the limitations of the Constitution.⁵ These complementary propositions are so frequently illustrated throughout the book that their statement here is sufficient. Sufficient too is the statement of the further elementary proposition that statutory provisions in respect to condemnation must be strictly complied with,⁶ and of its obvious corollary, that the burden of proving compliance rests upon those who claim statutory powers.⁷

¹ California Cent. R. v. Hooper, 76 Cal. 404.

² Kohl v. United States, 91 U. S. 367; Mark v. State, 97 N. Y. 572; Union Ferry Co., 98 N. Y. 139; Carother's Appeal, 118 Pa. 468; Cent. Branch U. P. R. v. Atchison, T. & S. F. R., 26 Kan. 669. See Tuttle v. Knox County, 89 Tenn. 157; South Beach R., 119 N. Y. 141; Bradshaw v. Rogers, 20 Johns. 103.

³ Poughkeepsie Bridge Co., 108 N. Y. 483.

⁴ Glover v. Boston, 14 Gray, 282; South Beach R., 119 N. Y. 141; Howe v. Williams, 13 R. L. 488; Phillips v. Dunkirk, W. & P. R., 78 Pa. 177; Lynch v. Comm. of Sewers, L. R., 32 Ch. D. 72.

⁵ Occum Co. v. Sprague Man. Co.,

35 Conn. 496; Bohlman v. Green Bay & M. R., 40 Wis. 157.

⁶ Murphy v. De Groot, 44 Cal. 51; Vreeland v. Jersey City, 54 N. J. L. 49; Colville v. Judy, 73 Mo. 651; Alabama Gt. South. R. v. Gilbert, 71 Ga. 591; Occum v. Sprague Man. Co., 35 Conn. 496; Chicago & N. W. R. v. Chicago, 132 Ill. 372; McCann v. Otoe County, 9 Neb. 324; New York & H. R. v. Kip, 46 N. Y. 546.

⁷ Dyckman v. New York, 5 N. Y. 434; Matter of Buffalo, 78 N. Y. 362; Anderson v. Pemberton, 89 Mo. 61; Lieberman v. Chicago & S. S. R., 141 Ill. 140; Parker v. Fort Worth & D. C. R., 84 Tex. 33; Toledo, A. A. & N. R. v. Munson, 57 Mich. 42. See also Kellogg v. New Britain, 62 Conn. 232; Hill v. Supervisors, 95 Cal. 239.

§ 110. Eminent domain statutes must conform to constitutional provisions in regard to the framing of laws. Thus the provision which obtains in certain States, that a statute shall embrace but one subject, which shall be set forth in its title, must be strictly obeyed.¹ It seems that this provision is disregarded in a statute authorizing condemnation for both public and private roads.² But a grant of power to condemn for public use and for public roads is not double. The specific use merely limits the general one.³ A statute incorporating companies of a special class, with power to condemn under an existing general law, is not repugnant to the provision. Thus, mine railroad corporations may be authorized to condemn according to the procedure prescribed in a general railroad law.⁴ The statute may be special, and thus offend against the declaration that corporate power shall only be conferred by general statutes.⁵ Again, the law may be repugnant to the constitutional prohibition against local laws of a certain character.⁶ Thus, a statute providing a peculiar tribunal for the assessment of compensation in respect to streets opened in Philadelphia was held unconstitutional.⁷ Where a statute enables owners of property within a city to recover compensation for injuries caused by the grading of streets, a law repealing it as to property in a certain district is unconstitutional, for it is special class legislation.⁸ A constitutional prohibition against incorporating existing statutes in new ones by reference merely, is not violated by so incorporating statutes which relate only to procedure and administrative detail.⁹

§ 111. *Implied Authority.* — An express grant of the right to condemn speaks for itself. The subject of implied grants in-

¹ *Astor v. Arcade R.*, 113 N. Y. 93; *Matter of Buffalo*, 46 N. Y. S. R. 81; *Anderton v. Milwaukee*, 82 Wis. 279. See *Carother's Appeal*, 118 Pa. 468; *New York & B. Bridge*, 72 N. Y. 527; *Mississippi, T. & L. B. R. v. Wooten*, 36 La. An. 441; *Union Depot v. Morton*, 83 Mich. 265.

² *Schehr v. Detroit*, 45 Mich. 626.

³ *Detroit v. Wabash, S. & P. R.*, 63 Mich. 712.

⁴ *De Camp v. Hibernia R.*, 47 N. J. L. 43.

⁵ *Atkinson v. Marietta & C. R.*, 15 Ohio St. 21. See *Ames v. Lake Superior & M. R.*, 21 Minn. 241; *Santa Cruz v. Enright*, 95 Cal. 105.

⁶ *Wilbert's Appeal*, 137 Pa. 494; *Cheltenham Township Road*, 140 Pa. 136. See *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446.

⁷ *Ruan St.*, 132 Pa. 257.

⁸ *Anderton v. Milwaukee*, 82 Wis. 279.

⁹ *Union Ferry Co.*, 98 N. Y. 139; *People v. Lorillard*, 135 N. Y. 285.

volves questions of statutory construction in great variety. The first requisite is that the act must contemplate the taking of private property for public use. Hence, where the legislature under the misapprehension that a private water-course is a public one, attempts to exercise dominion over it without providing for compensation to the owners, the statute is invalid.¹

Authority to purchase does not include the power to condemn. Although *purchase*, at the common law, includes, technically, all modes of acquisition other than descent, its meaning in a statute is limited to "acquisition by contract between the parties, without governmental interference."² If a statute permits a corporation to acquire land, and does not plainly authorize condemnation, it will be effectuated as authorizing purchase.³ Where a corporation is unable to "locate, construct, and maintain a railroad within the location of any other railroad in said city," upon such terms as may be agreed upon, or be imposed by commissioners in case of disagreement, the commissioners cannot empower the corporation to take the land in question.⁴ A statute which simply authorizes commissioners to select a site for a city hall, will not justify the selection of private property against the will of its owner, but will warrant the selection of land already owned by the city.⁵

§ 112. A grant of the eminent domain is not necessarily implied, because without it the execution of the undertaking is problematical, or even practically impossible.⁶ Thus, it has been said that the mere incorporation of a railroad company, without a further grant of franchises, would not authorize the condemnation of land for a right of way.⁷ Still less will a right to condemn be inferred, because the powers expressly conferred cannot in fact be used to the best advantage without it. Hence a gen-

¹ Fleming's Appeal, 65 Pa. 444.

² Kohl v. United States, 91 U. S. 367. See Burt v. Ins. Co., 106 Mass. 356.

³ Albany St., 11 Wend. 149; Embury v. Connor, 3 N. Y. 511; Boston & L. R. v. Salem & L. R., 2 Gray, 1; Carson v. Coleman, 11 N. J. Eq. 106. See also Payne v. Kansas & A. R., 46 Fed. Rep. 546; Montgomery's Case, 48 Fed. Rep. 896; Managers' Met. Asylum Dist. v. Hill, 6 App. Cas. 193; Perry v. Wilson, 7 Mass. 393.

⁴ Worcester & N. R. v. Railroad Comm., 118 Mass. 561.

⁵ People v. Rochester, 50 N. Y. 525.

⁶ See Thacher v. Dartmouth Bridge, 18 Pick. 501; Territorial Roads, 7 Opinions Attys.-Gen., Cushing Atty.-Gen. Compare Linton v. Sharpsburg Bridge, 1 Grant's Cas. (Pa.) 414.

⁷ Keyport Steamboat Co. v. Farmers' Trans. Co., 18 N. J. Eq. 13.

eral power to preserve health will not enable a city to condemn land to that end.¹ A city cannot condemn a right of way for a sewer by virtue of a power to construct sewers,² nor widen a stream under an authorization to remove deposits therefrom.³ A statute permitting land to be purchased for a log boom, and authorizing the purchaser to impound logs, does not authorize the flooding of land without consent of its owner.⁴

A right to condemn will not be found by analogy only, — because it is usually granted for the purpose in question. Hence a private corporation authorized to construct water-works is not thereby invested with the right to condemn, though the power is usually given to municipal corporations for such a purpose, and though a particular city is authorized to contract with the corporation for a supply of water.⁵ But if a corporation be lawfully commanded to do a thing which can only be accomplished through condemnation, a grant of power will be implied.⁶ Hence, if a railroad corporation be compelled to restore a highway, the right to condemn the necessary land will be implied.⁷ But a company authorized to condemn land for a railroad and its appendages, cannot, of their own motion, condemn land for a street, in order to make good to the public the loss of an existing street through which they intend to lay their road.⁸

§ 113. The right of eminent domain must be exercised in strict conformity with the purpose for which it was granted. It cannot be used for another purpose.⁹ Thus, a new street cannot be opened under an ordinance directing the widening of a street.¹⁰ Under an act authorizing the condemnation of land adjoining a highway in order to make ditches for draining water from the

¹ *Cavanagh v. Boston*, 139 Mass. 426. See also *Markham v. Brown*, 37 Ga. 277.

² *Allen v. Jones*, 47 Ind. 438.

³ *Schenectady v. Furman*, 68 Hun, 171.

⁴ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

⁵ *State v. Salem Water Co.*, 5 Ohio C. C. 58.

⁶ See *Valley R. v. Bohm*, 34 Ohio St. 114. See § 105.

⁷ *People v. Dutchees & C. R.*, 58 N. Y. 152. *State v. St. Paul, M. & M. R.*, 35 Minn. 131.

⁸ *Chicago & N. W. R. v. Galt*, 133 Ill. 657.

⁹ *Galloway v. London, L. R.* 1 H. L. 34; *Sandford v. Martin*, 31 Iowa, 67; *McLaughlin v. Sandusky*, 17 Neb. 110; *Pickman v. Peabody*, 145 Mass. 480.

¹⁰ *Chicago & N. R. v. Chicago*, 132 Ill. 372. See also *Thirty-Fourth St.*, 10 Phila. 197.

highway, ditches cannot be made for the purpose of carrying off town sewage which has been carried to the highway by drains.¹ A company organized under a street railway act cannot claim the benefit of a general railroad act, and condemn private property for their entire right of way, but may condemn only such property as may be necessary to serve the purposes of a railway laid through streets.²

In some cases, a grant of power is construed so as to permit condemnation for several uses, either because of the breadth of its terms, or because the uses themselves are held to be substantially similar. Land may be condemned for an elevated railroad under a general law which authorizes the construction of any railroad.³ Under the General Railroad Law of New York a horse railroad may be built,⁴ but not a railroad laid through a city on a viaduct, the reason for the distinction being that, at the passage of the act, roads of the latter description were unknown, and therefore not provided for.⁵ As the approaches to a public bridge are a part of the system of roads, a city may condemn land for approaches under a general power to open streets.⁶ The telegraph and the telephone have been deemed to be sufficiently similar to warrant the organization of a telephone company under an act incorporating telegraph companies.⁷

The statutory definition of the use must not be taken so literally as to preclude condemnation for a purpose necessarily incidental to the main use. Hence, where several tracts of land are to be condemned for a cemetery, the owner of one which is not to be used as a place of interment, but as a driveway, cannot assert a want of authority.⁸

¹ *Dierks v. Comm.*, 142 Ill. 197.

² *South Beach R.*, 119 N. Y. 141.

³ *Lieberman v. Chicago & S. S. R.*, 141 Ill. 140. See *Koch v. North Ave. R.*, 75 Md. 222; *Fulton v. Short Route R.*, 85 Ky. 640.

⁴ *Washington St., etc. R.*, 115 N. Y. 442.

⁵ *People's Rapid Transit R. v. Dash*, 125 N. Y. 93. See *Bishop v. North*, 11 M. & W. 418.

⁶ *Township of Kearney v. Ballantine*, 54 N. J. L. 194, reversing s. c. 52 N. J.

L. 338. See also *Reed v. Camden*, 53 N. J. L. 322.

⁷ *Duke v. Cent. N. J. Tel. Co.*, 53 N. J. L. 341. See also *Cumberland Tel. Co. v. United Electric R.*, 42 Fed. R. 273; *Hudson River Tel. Co. v. Water-vliet R.*, 135 N. Y. 393; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32; *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399; *Atty.-Gen. v. Edison Tel. Co.*, L. R. 6 Q. B. D. 244.

⁸ *Balch v. County Comm.*, 103 Mass. 106.

§ 114. The courts are occasionally called upon to construe statutes which do not state the purposes of condemnation with precision. Although a grant of the eminent domain to a city for all purposes for which the state itself might exercise it, might be hopelessly indefinite, a grant for any "lawful use or purpose" has been effectuated by construing "lawful" to refer to "such uses as the legislature has already expressed its willingness to promote by the power of eminent domain."¹ A statute, enabling a city to condemn land for "streets . . . or other public grounds," does not permit condemnation for a city prison.² Where a water company were authorized to condemn water for municipal and domestic uses, and for "other purposes," they were enjoined from taking water to supply factories with motive power, this being a private use, and "other purposes" referring only to public uses.³

§ 115. **Expiration of Power.** — An important question is raised by the assertion of a property owner that the power to condemn has expired. This assertion may be based on the wording of the statute. The legislature may annex to a grant of the eminent domain a condition that the power shall be exercised, or that the work shall be completed, within a given time. The condition may be so worded as to enable an owner to take advantage of a breach of it.⁴ This construction was placed upon a statute which declared that, if a railroad corporation should not begin the construction of its road and expend thereon ten per cent of its capital within five years, and complete the road within ten years, from the filing of the certificate of incorporation, "its corporate existence and powers shall cease."⁵

But where time conditions are conditions subsequent, they are not self-executing. A breach is a mere cause of forfeiture of which the state alone can take advantage.⁶ Thus, a condition

¹ *Slingerland v. Newark*, 54 N. J. L. 62.

² *East St. Louis v. St. John*, 47 Ill. 463.

³ *Barre Water Co.*, 62 Vt. 27.

⁴ *Peavey v. Calais R.*, 30 Me. 498; *Morris & E. R. v. Central R.*, 31 N. J. L. 205. See also *Atlantic & P. R. v. St. Louis*, 66 Mo. 228.

⁵ *Brooklyn, W. & N. R.*, 72 N. Y. 245.

⁶ *Cincinnati, H. & I. R. v. Clifford*, 113 Ind. 460; *New York & N. E. R. v. New York, N. H. & H. R.*, 52 Conn. 274. See also *Plecker v. Rhodes*, 30 Gratt. 795.

that, unless a certain sum be expended within a certain time, the corporation "shall cease to exist," expresses a duty to the state, the non-performance of which cannot be urged by an owner.¹ Where a company are ordered to locate the undertaking "as soon as they conveniently can," there is not such a limitation as will prevent condemnation for incidental purposes many years after the original construction.²

§ 116. **Exhaustion of Power.** — As the eminent domain cannot be parted with,³ it follows that it cannot be exhausted by exercise.⁴ This statement is applicable to the state alone, which holds the power in gross, as it were, to be given out as occasion demands. An effort to condemn, futile by reason of its irregularity, does not prevent, of course, the institution of proper proceedings.⁵ When the right to condemn is granted to a corporation for a particular undertaking, it retains its vitality until the work is completed.⁶ The courts endeavor to construe the grant so as to enable the grantee to exert the right from time to time, in order to bring the undertaking to the highest state of efficiency, and so maintain it. Thus, a canal corporation, which had built a canal and operated it for years, may yet condemn property in order to maintain the supply of water.⁷ Aqueduct companies may condemn new supplies of water from time to time, in order to keep abreast with the demands of the communities to whose wants they are authorized to minister.⁸ A railroad company may continue to condemn for such incidental uses as the growth of business demands.⁹

¹ *Briggs v. Cape Cod Canal*, 137 Mass. 71.

² *Philadelphia, W. & B. R. v. Williams*, 54 Pa. 103.

³ See § 100.

⁴ See *New York, H. & N. R. v. Boston, H. & E. R.*, 36 Conn. 196; *Mobile & G. R. v. Alabama Midland R.*, 87 Ala. 501.

⁵ *Lehigh Val. R. v. Dover R.*, 43 N. J. L. 528; *Williams v. Hartford & N. H. R.*, 13 Conn. 397.

⁶ *Ligat v. Commonwealth*, 19 Pa. 456; *Water Comm. v. Lawrence*, 3 Edw. Ch. 552.

⁷ *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 36.

⁸ *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Olmsted v. Morris Aqueduct Co.*, 46 N. J. L. 495; s. c. 47 N. J. L. 311; *Johnson v. Utica Water Works Co.*, 67 Barb. 415.

⁹ *Philadelphia, W. & B. R. v. Williams*, 54 Pa. 103; *Chicago, B. & Q. R. v. Wilson*, 17 Ill. 123; *Cooper v. Annapolis & A. R.*, 85 Ala. 106; *Peck v. Louisville, N. A. & C. R.*, 101 Ind. 366; *Brown v. Philadelphia, P. & W. R.*, 58 Md. 539; *Cent. Branch U. P. R. v. Atchison, etc. R.*, 26 Kan. 669; *Toledo & W. R.*

If a public use is injured by the legitimate use of other property, the injury may be abated by condemning the property. Thus, an aqueduct company cannot enjoin the use of a private stream for the watering of stock, though the water be fouled, but may condemn it.¹ A railroad company may condemn property in order to make their undertaking safe.²

§ 117. A corporation will not be allowed to substantially enlarge the original scope of the undertaking, or make a radical change of location, on the plea of increased efficiency.³ In *Blakeman v. Glamorganshire Canal Company*,⁴ Lord Eldon held that the power to "improve" the canal did not include the right to widen it, or alter its course, as that would make it a canal other than the one authorized. But where power is given to build a canal "of suitable width and dimensions to be determined by the corporation," the canal may be enlarged.⁵

§ 118. **Condemnation after Possession taken.** — Proceedings to condemn are usually commenced before entry on the land desired. This is the proper course. At the same time, where the power to condemn exists, and entry is made, under any circumstances, without formal proceedings, the courts will usually permit the corporation to perfect its possession by taking proceedings.⁶ But where possession is taken under an agreement, in which a consideration is definitely expressed, the corporation cannot repudiate the agreement and condemn the land.⁷ If possession is taken under a lease, and the exigencies of the work require a permanent interest in the land, the corporation may condemn.⁸ So, a corporation in possession of land may condemn

v. Daniels, 16 Ohio St. 390; *Deitrichs v. Lincoln & N. W. R.*, 13 Neb. 361. See also *Chicago & W. L. R. v. Illinois Cent. R.*, 113 Ill. 156.

¹ *Helfrich v. Catonsville Water Co.*, 74 Md. 269.

² *Reusch v. Chicago, B. & N. R.*, 57 Iowa, 687.

³ See §§ 163, 164.

⁴ 1 My. & K. 154.

⁵ *Selden v. Delaware & H. Canal*, 29 N. Y. 634. See *Farnham v. Delaware & H. Canal*, 61 Pa. 265.

⁶ *Cory v. Chicago, B. & K. C. R.*, 100 Mo. 282; *Coster v. New Jersey R.*, 24 N. J. L. 730; *Leeds v. Camden & A. R.*, 53 N. J. L. 229. See also *Hanlin v. Chicago & N. W. R.*, 61 Wis. 515; *Baltimore & H. R. v. Algire*, 65 Md. 337; *Fisher v. Chicago & S. R.*, 104 Ill. 323; *North Hudson County R. v. Booraem*, 28 N. J. Eq. 450.

⁷ *Gray v. Burlington & M. R.*, 37 Iowa, 119. See *Coe v. New Jersey Midland R.*, 30 N. J. Eq. 21.

⁸ *New York Cent. & H. R. R. v. Kip*,

an outstanding reversionary interest.¹ A corporation which has wrongfully entered may be allowed to perfect its possession by an orderly condemnation.² But in such case the owner is not deprived of redress on account of the trespass. A corporation which wrongfully enters upon land, cannot enjoy the protection of a statute which provides that a corporation, taking possession in good faith under a defective title, may retain possession and institute proceedings to condemn.³

§ 119. *Ultra Vires*. — As promoters of public works must find their authority for interfering with private rights in powers conferred by the legislature, the question suggests itself as to the sufficiency of their plea of *ultra vires* in answer to a demand for redress. It should be noted in passing, that the plea is not pertinent in cases of tort. True, the legislature does not authorize the commission of wrongs. In a broad sense, all the torts of a corporation are *ultra vires*. But where the injury is due to the improper use of powers granted, it is not *ultra vires*, in the technical sense. There is not an assumption of powers withheld, but simply an abuse of powers conferred.

Where a political corporation unlawfully attempts to promote a public use, it cannot be held responsible for compensation to property owners as if its action were lawful.⁴ In *Matter of Buffalo*⁵ the city proceeded to open a street over private property without observing certain jurisdictional prerequisites. Some of the owners insisted upon payment of compensation. It was held that the city could plead *ultra vires*. The compensation fund was to be raised by special assessment, and as the persons assessed could refuse to pay their quotas because of the illegality of the undertaking, the city was bound to protect itself. Where town officers disregarded a prohibition against laying out a street over land, where the cost of removal of buildings would exceed

46 N. Y. 546; *Heise v. Pennsylvania R.*, 62 Pa. 67. See also *DeCamp v. Hibernia R.*, 47 N. J. L. 43; *Tait's Exr. v. Cent. Lunatic Asylum*, 84 Va. 271.

¹ *Page v. Baltimore*, 34 Md. 558.

² *Jones v. New Orleans & S. R.*, 70 Ala. 227; *State v. Jacksonville, T. & K. W. R.*, 20 Fla. 616. See also *Grand*

Rapids, L. & D. R. v. Chesebro, 74 Mich. 466.

³ *St. Lawrence & A. R.*, 133 N. Y. 270.

⁴ See *Gregg v. Baltimore*, 56 Md. 256; *Loyd v. Columbus*, 90 Ga. 20.

⁵ 78 N. Y. 362.

one hundred dollars, their plea of *ultra vires* in defence to a claim for compensation was sustained.¹ In *Wheeler v. Essex Road Board*,² the defendants, in widening a road, removed a dam which impounded water used by the plaintiff to run a mill. The defendants built a new dam, instead of paying compensation to the plaintiff as the statute prescribed. The dam, having been improperly built, gave way, and the plaintiff's land was flooded. It was held that the defendants were not liable, as they had no right to build the dam.³

A contractor was employed by a city to place an embankment on private property. As compensation had not been tendered to the owner, the work was enjoined. The contractor sued for damages on account of the delay caused by the injunction, but failed to recover. It was held that he should have informed himself that the city could not construct the work, without tendering compensation.⁴

§ 120. It will be convenient to consider here the question as to the power of a corporation to incur, voluntarily, an obligation to compensate for damage for which it is not liable under the statute. In a recent suit brought against a railroad corporation on account of certain consequential damage, it was said: "These laws (the statutes of incorporation) . . . authorize the taking of such lands only as are requisite for the necessary structures of the road and the accommodation of its business, and require the payment of damages only to that class of landowners. These corporations are not permitted to sequester other property, nor to compensate for other damage."⁵ Now it may well be that a private corporation, invested with public powers in order to accomplish a work of public utility, should not be permitted to assume obligations the performance of which would cripple its ability. But, as these corporations obtain their compensation funds from private sources, it would seem that they may voluntarily incur liabilities beyond their charter obligations without necessarily impairing the interest of the public in their works.

¹ *Cuyler v. Rochester*, 12 Wend. 165.

⁴ *Mathewson v. Grand Rapids*, 88

² 39 N. J. L. 291.

Mich. 558.

³ See also *Anthony v. Adams*, 1 Met.

⁵ *Beseman v. Pennsylvania R.*, 50

284; *Cavanagh v. Boston*, 139 Mass. N. J. L. 235.
426.

It has been held that a municipal corporation may bind itself to make compensation for injuries due to a change of grade, although under the law no compensation is due.¹ This position seems to be untenable. It permits a municipal corporation to disregard the positive law in respect to its liabilities, and set up its own standard. It violates the doctrine of *ultra vires* which, harsh in some respects, is at its very best where it is invoked by a taxpayer to nullify the unlawful and improvident action of those who, for the time being, are charged with the public expenditure.² But whatever may be thought of the power of a political corporation to extend its liabilities, it is plain that its officials cannot, of their own motion, make a valid promise to pay compensation where none is due in law.³

Effect of Alterations in the Law.

§ 121. The effect of alterations in constitutional and statute law in respect to the eminent domain is to be adjudged with reference to the rule that vested rights shall not be impaired by legislation. Alterations in practice are noticed elsewhere.⁴ The present inquiry is in regard to substantial changes in the law.

The law in force at the institution of proceedings to condemn is, generally speaking, the law by which the rights and liabilities of the parties are determined. A proceeding, having for its object the ascertainment of compensation subsequent, is valid, notwithstanding that before payment a new Constitution is adopted, which prescribes the payment of compensation before entry.⁵ Where a short-lived statute allowed compensation for damage due to change of grade, a city, which had decided definitely upon a particular change, was compelled to pay compensation, though the statute had been repealed before the work was actually done.⁶ Where proceedings were commenced under a statute allowing benefits to be set off against damages, and the statute was repealed during the pendency of the proceedings, it was decided that compensation must be assessed under the later

¹ Goodall v. Milwaukee, 5 Wis. 32.

⁴ See § 315.

² See also Dillon, Mun. Corp., 4th ed., p. 1227, n.

⁵ Townsend v. Chicago & A. R., 91 Ill. 545.

³ Healey v. New Haven, 49 Conn. 394.

⁶ Healey v. New Haven, 49 Conn. 394.

law.¹ It appears that where the charter of a railroad company authorizes the taking of the fee in land condemned, this estate will be acquired by proceedings commenced prior to the adoption of a constitutional provision forbidding the acquisition of a fee.²

Corporations organized under constitutions and statutes not prescribing compensation for consequential injuries, have tried to escape a heavier liability imposed by later laws, by asserting a charter contract that their liability shall be only that existing at the date of incorporation. But the courts have decided that the grant of a charter, at a time when compensation need be paid only for property actually taken, does not give the grantee a vested interest in the continuance of this state of the law, but that new and heavier liabilities may be freely imposed.³ But an additional liability cannot be imposed in respect to works already completed,⁴ unless it is accepted by the corporation.⁵ A charter right to enter upon land before paying compensation has been held not affected by a subsequent constitutional declaration that payment shall precede entry.⁶

¹ *Springfield & I. R. v. Hall*, 67 Ill. 345; *Perrysburg Canal v. Fitzgerald*, 10 Ohio St. 513.

² *Peoria & R. I. R. v. Birkett*, 62 Ill. 332. ⁴ *Chicago v. Ramsey*, 87 Ill. 348; *Towle v. Eastern R.*, 18 N. H. 547;

³ *Pennsylvania R. v. Miller*, 132 U. S. 75; *Pennsylvania R. v. Duncan*, 111 Pa. 352; *Drady v. Des Moines & F. D. R.*, 57 Iowa, 393; *M'Elroy v. Kansas City*, 21 Fed. Rep. 257; *Taylor v. Bay City St. R.* 80 Mich. 77. See also *Albany North. R. v. Brownell*, 24 N. Y. 345; *Philadelphia, W. & B. R.*, 4 Harr. (Del.) 389. See *Philadelphia v. Wright*, 100 Pa. 235; *Sinnott v. Chicago & N. R.*, 81 Wis. 95.

⁵ *Monongahela Nav. Co. v. Coon*, 6 Pa. 379.

⁶ *Lehigh Val. R. v. McFarlan*, 31 N. J. Eq. 706.

CHAPTER VI.

ACQUISITION OTHERWISE THAN BY CONDEMNATION.

§ 122. The acquisition of property in furtherance of public works by means other than condemnation is foreign to our subject, in some respects. But in so far as such acquisition is in lieu of condemnation, it is sufficiently germane to merit attention.

A grant of power to condemn does not exclude, as a rule, the power to purchase the necessary property.¹ This proposition is generally unobjectionable. While a property owner may well resist condemnation by virtue of a power to purchase,² he is not prejudiced by the addition of the right to buy to the right to condemn. The power to purchase may be often larger than the power to condemn, for the latter can be used only for strictly public purposes. The distinction is important. If a corporation purchases land for its private convenience, it occupies in any controversy the position of a private proprietor. If it purchases for public use, its position is better in some respects. For example, where the person with whom the agreement is made is not the true owner, the latter may not enjoin the operation of the public undertaking, but is left to his remedy at law,³ and even this remedy is affected by the fact that the property is held to public use, for on a verdict in ejectment the writ may be stayed in order that the corporation may condemn.⁴ So if an ordinary proprietor is saddled with a more onerous duty toward his neighbor than is imposed upon those who have condemned for public use,⁵ it seems that a corporation purchasing property for, and devoting it to, the public use should enjoy the more

¹ *Leeds v. Richmond*, 102 Ind. 372. N. J. Eq. 316. See also *Lantermann v.*

² See § 111. *Blairstown R.*, 28 N. J. Eq. 1.

³ *Pickert v. Ridgely Park R.*, 25 ⁴ See § 379. ⁵ See § 137.

favorable position.¹ But there may be cases where a corporation purchasing, instead of condemning, enlarges at once its estate and its responsibilities. Thus, it has been held that where a corporation purchases land, it takes the fee subject to dower rights, which would not have attached had it condemned the lesser estate authorized by the statute.²

§ 123. Where the right to condemn is qualified so as to prevent injury to certain property, the right to purchase may be subject to the same restriction. Thus where a corporation is forbidden to condemn a site for a cemetery within two hundred yards of a dwelling, it may be prevented from purchasing a site within the limit.³

The right to condemn is not always accompanied by an implied right to purchase where political corporations are the actors. These expend public moneys, and where they are empowered to acquire property at an impartial valuation it does not follow that the officials, who, at the moment represent the public, are entitled to agree upon terms.⁴ A board of freeholders lawfully discontinued proceedings to condemn after the amount of compensation had been ascertained. They subsequently agreed to purchase the property for the amount ascertained, and ordered an issue of bonds to cover the amount. The owners tried to compel the board to issue the bonds and pay the price. The court held that the statute did not enable the board to prescribe the terms upon which the land should be acquired, but simply gave it the discretion to accept or reject the terms fixed by another tribunal. Therefore the resolution to purchase was invalid.⁵ Where the legislature authorizes a city to purchase water-works, when and at such price as may be agreed upon by the parties, and in case of disagreement enables the city to condemn the works within two years from the passage of the act, the power to purchase is special, not general, and must be exercised within the two years.⁶

¹ See *London B. & S. C. R. v. Truman*, 11 App. Cas. 45.

² *Nye v. Taunton Branch R.*, 113 Mass. 277.

³ *Henry v. Trustees*, 48 Ohio St. 671.

⁴ See *Hyde Park v. Spencer*, 118 Ill. 446; *Hanlon v. Supervisors*, 57 Barb. 383.

⁵ *Mabon v. Halstead*, 39 N. J. L. 640.

⁶ *Ziegler v. Chapin*, 126 N. Y. 342.

Property which could be condemned, but which is acquired in some other way, is, generally speaking, on a plane with property condemned, for the reason that it is acquired for the public use. Thus an easement purchased is none the less protected from sale on execution than an easement condemned.¹ If a liability be imposed for injuries consequent on the construction of public works, it bears as heavily where the damage is traceable to construction on purchased land, as it does on land condemned.²

§ 124. An attempt to purchase the property needed for public use is usually made by the statute a condition precedent to condemnation. This condition is not essential, however.³ This statutory requirement is in some sense a formality, albeit an essential one,⁴ as the price offered or demanded need bear no relation to the real value of the property. A simple refusal to sell, or a demand deemed excessive, commonly satisfies the condition.⁵ Where one is authorized to condemn land, the "title to which he cannot otherwise acquire," the condition is satisfied if he cannot obtain the land at a price he is willing to pay.⁶ Inability to sell owing to the legal incapacity of the owner is tantamount to a refusal to sell within the meaning of the statute.⁷ A refusal to sell has been inferred from the positive action of the owner, such as filing a petition for damages,⁸ or obstructing the progress of the undertaking.⁹ But an implied refusal must plainly appear in order to excuse the expropriator from complying with the plain command of the statute.

¹ *Hill v. West. Vt. R.*, 32 Vt. 68.

² *Butcher's Ice Co. v. Philadelphia*, 156 Pa. 54; *Wylie v. Elwood*, 134 Ill. 281; *Chicago, K. & N. R. v. Hazels*, 26 Neb. 364. See also *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Bartlett v. Tarrytown*, 52 Hun, 380; *Montgomery v. Townsend*, 80 Ala. 489. See *Pennsylvania R. v. Lippincott*, 116 Pa. 472.

³ *Detroit v. Beecher*, 75 Mich. 454; *Burt v. Ins. Co.*, 106 Mass. 356. See also *Brown v. Rome & D. R.*, 86 Ala. 206; *Pasadena v. Stimson*, 91 Cal. 238; *Swinney v. Ft. Wayne, M. & C. R.*, 59 Ind. 205; *Hall v. People*, 57 Ill. 307.

⁴ See § 326.

⁵ *Prospect Park & C. I. R.*, 67 N. Y. 371; *Village of Middletown*, 82 N. Y. 196; *Todd v. Austin*, 34 Conn. 78; *Grand Rapids & L. R. v. Weiden*, 69 Mich. 572. See also *Ward v. Minnesota & N. W. R.*, 119 Ill. 287.

⁶ *Westfield Cem. Association v. Danielson*, 62 Conn. 319.

⁷ *Balch v. County Comm.*, 103 Mass. 106; *Indiana Cent. R. v. Oakes*, 20 Ind. 9. See also *Brown v. Rome & D. R.*, 86 Ala. 206.

⁸ *Ætna Mills v. Waltham*, 126 Mass. 422.

⁹ *Schnylkill & S. Nav. Co. v. Dffenbach*, 1 Yeates, 367.

The condition is not satisfied where the petitioner avers that he is informed and believes that the owner will not sell at a reasonable price;¹ where it appears that the owner was ignorant of the purpose for which his land was wanted;² where a proposal to sell was received and tabled.³ If a railroad company are authorized to condemn a right of way over the tracks of another, after failing to agree as to compensation, and place and manner of crossing, an averment that the company were unable to agree in regard to "terms" was held insufficient, as not importing an effort to agree on any subject save compensation.⁴ A petition which describes more land than the petitioner is authorized to condemn, and avers inability to agree for the purchase thereof, will be set aside if the attempt to purchase is a condition precedent, for there is nothing to show that the proper quantity could not have been bought.⁵

Where an agreement is made it cannot be arbitrarily repudiated. A city condemned a strip of land fifty feet wide, with the immediate purpose of laying a sewer through the middle, and the ulterior purpose of opening the full width as a street. A railroad company wishing to cross the strip agreed to carry their line over by means of a bridge of such dimensions as would not interfere with the prospective street use. Before the bridge was completed the street was opened. The company then sought to condemn a crossing less favorable to the use of the street. The court found, that an attempt to agree was a condition precedent to condemnation, and that the company had in fact made an agreement which they could not repudiate merely for the sake of convenience or economy.⁶

§ 125. *Acquisition by Deed.* — A conveyance accepted in lieu of proceedings to condemn is to be treated in most respects as an ordinary deed, but there are some features of special interest. The description is commonly by metes and bounds, yet it may indicate but the width of a right of way over the tract in ques-

¹ *Metropolitan El. Ry. v. Dominick*, 55 Hun, 198.

² *Union Depot Co. v. Jones*, 83 Mich. 415.

³ *Lane v. Saginaw*, 53 Mich. 442.

⁴ *Lake Shore & M. S. R. v. Cincinnati, W. & M. R.*, 116 Ind. 578.

⁵ *Central R. v. Hudson Terminal R.*, 46 N. J. L. 289.

⁶ *State v. Nat'l Docks R.*, 55 N. J. L. 194.

tion, leaving the actual location of the way to the discretion of the grantee;¹ and the grant of a way over any lands of the grantor has been sustained.² If one agrees to convey to a corporation such land as shall be required for its undertaking, it seems that he is bound to convey as much as the corporation could have condemned, but no more.³ Nor can one who has agreed to convey for a certain price per foot a tract referred to, but not described by metes and bounds, compel the corporation to take more than will satisfy the needs of the undertaking.⁴ So, it has been held that a deed for a right of way vests in the grantee the width of way actually used, not that which might have been condemned under the statute.⁵

§ 126. It has been suggested that, in the absence of a definite expression to the contrary, the interest which passes is, presumably, at least as large as the corporation could have condemned.⁶ But it has been held that where a right of way, or other limited use, is conveyed, the corporation takes but an easement, although it could have condemned a larger interest.⁷ A fee will pass where apt words are used, if the corporation is authorized to hold property in fee,⁸ although the fee could not have been condemned.⁹

If the use for which the land is conveyed is named in the deed there is usually a limitation on the estate.¹⁰ Thus, where land is conveyed to a railroad corporation for a general right of way it has been held that the grantee cannot lay side tracks to a stock-yard upon it.¹¹ Where one has sold land to a corporation for a particular use he cannot object to the substitution of another corporation for the original grantee, so long as the use is not altered.¹²

¹ *Burrow v. Terre Haute & L. R.*, Ind. 77. See *Vermilya v. Chicago, M. & S. P. R.*, 66 Iowa, 606.

² *Conwell v. Springfield & N. W. R.*, 81 Ill. 232. See *Hall v. Pickering*, 40 Me. 548.

³ See *Hill v. West. Vt. R.*, 32 Vt. 68.

⁴ *Boston & M. R. v. Babcock*, 3 Cush. 228.

⁵ *Ft. Wayne, C. & L. R. v. Sherry*, 126 Ind. 334.

⁶ See *Hill v. West. Vermont R.*, 32 Vt. 68.

⁷ *Cincinnati, I. etc. R. v. Geisel*, 119

Ind. 77. See *Vermilya v. Chicago, M. & S. P. R.*, 66 Iowa, 606.

⁸ *Holt v. Somerville*, 127 Mass. 408; *Page v. Heineberg*, 40 Vt. 81.

⁹ *Heath v. Barmore*, 50 N. Y. 302.

¹⁰ *Helm v. Webster*, 85 Ill. 116; *O'Neal v. Sherman*, 77 Tex. 182. See also *Rose v. Hawley*, 118 N. Y. 502; *New York Cent. & H. R. R. v. Aldridge*, 135 N. Y. 83.

¹¹ *Donnithorpe v. Fremont, E. & M. R.*, 30 Neb. 142.

¹² *Southard v. Cent. R.*, 26 N. J. L.

§ 127. Where the consideration is in money the only question is the simple one of payment. The mere fact that the consideration is exorbitant, or inadequate, is not usually cause for rescission, in the absence of fraud or mistake. Yet where one called upon the receiver of an insolvent corporation to pay compensation according to the terms of an agreement made with the corporation, a court of equity disallowed the claim on the score of exorbitancy, nor would it permit the claimant to re-enter upon the land, because of his long acquiescence in its use by the corporation. It was held that just compensation should be formally assessed.¹ A railroad company bought the greater part of the stock of a canal corporation, and then elected a board of directors who transferred the canal to the railroad company for an inadequate price. It was held that the transaction could not be set aside, as the minority of dissenting stockholders of the canal corporation had not been diligent in asserting their rights, but the vendee was compelled to pay full value for the property.²

§ 128. Quite frequently property is conveyed upon the consideration that the grantee shall do certain things for the benefit of the grantor. The first point to be determined is whether the consideration is beyond the powers of the corporation. As a rule these agreements are valid. For example, railroad companies may agree to maintain fences, farm-crossings, and like conveniences, and to build a station at a particular place. But a promise not to build a station at a particular point, or within specified limits, has been declared void as against public policy.³ Where one agrees to convey land to a railroad corporation upon the consideration that the grantee will fence the right of way, there is no legal consideration where the corporation is compelled to fence by law, and the owner may have compensation assessed.⁴

13; *Junction R. v. Ruggles*, 7 Ohio St. 1. See also *New Jersey Midland R. v. Van Syckle*, 36 N. J. L. 496.

¹ *Coe v. N. J. Midland R.*, 30 N. J. Eq. 21. See *Adams v. St. Johnsbury & L. C. R.*, 57 Vt. 240.

² *Goodin v. Cincinnati & W. Canal*, 18 Ohio St. 169.

³ *March v. Fairbury, P. & W. R.*, 64

Ill. 414; *St. Louis, J. & C. R. v. Mathers*, 71 Ill. 592; *St. Joseph & D. R. v. Ryan*, 11 Kan. 602; *Williamson v. Chicago, R. I. & P. R.*, 53 Iowa, 126. See also *Fuller v. Dame*, 18 Pick. 472; *Mobile & O. R. v. People*, 132 Ill. 559.

⁴ *Shortle v. Terre Haute & I. R.*, 131 Ind. 338.

The nature of these agreements has been discussed in determining the choice of remedies for their breach. In some cases the courts have been constrained to consider a breach as a forfeiture of the estate, as where land was conveyed for a right of way, on condition that the railroad should be completed within two years.¹ Specific performance of the condition will not be decreed, as a rule, where performance should, in the public interest, be left to the discretion of the corporation. The condition will be treated as a condition subsequent, not a covenant. Thus the courts have refused to compel railroad companies to fulfil a promise to erect a station,² or to stop trains at a certain point.³ The usual remedy for breach of condition is an ordinary action for damages. If, however, the subject of the agreement is destroyed by reason of the future extension or improvement of the public undertaking, compensation may be claimed as for property taken for public use. Thus, where a railroad company purchased land for the partial consideration of a private way under the roadbed, and subsequently blocked the way by building a dam, the owner obtained compensation for a taking of his property.⁴

§ 129. There is a well-settled rule to the effect that where property is purchased where it might have been condemned, the consideration is conclusively presumed to cover all damage to the remainder of the tract for which the owner could have obtained compensation in condemnation proceedings.⁵ The rule applies only to damage to the tract in question.⁶ The injury covered by the consideration must be done by, or in the interest of, the vendee. The owner of a lot abutting on a street sold a

¹ *White v. Memphis, B. & A. R.*, 64 Miss. 566.

² *Blanchard v. Detroit, L. & L. R.*, 31 Mich. 43. Compare *Lawrence v. Saratoga Lake R.*, 36 Hun, 467; *Wilson v. Northampton & B. R.*, 9 Ch. App. 279.

³ *Blanchard v. Detroit, L. & L. R.*, 31 Mich. 43.

⁴ *Chicago, S. F. & C. R. v. Miller*, 106 Mo. 458.

⁵ *Norris v. Vt. Cent. R.*, 28 Vt. 99; *Radke v. Minn. & S. L. R.*, 41 Minn. 350; *St. Louis, I. M. & S. R. v. Wal-*

brink, 47 Ark. 330; *Barrow v. Terre Haute & L. R.*, 107 Ind. 432; *North & W. B. R. v. Swank*, 105 Pa. 555; *Uddegrove v. Pa. Schuylkill, etc. R.*, 132 Pa. 540; *Chicago, R. & P. R. v. Smith*, 111 Ill. 363; *Faires v. San Antonio & A. R.*, 80 Tex. 43; *Cassidy v. Old Colony R.*, 141 Mass. 174; *Hodge v. Lehigh Val. R.*, 39 Fed. Rep. 449; *Hongan v. Milwaukee & S. P. R.*, 35 Iowa, 558.

⁶ *Longworth v. Meriden & W. R.*, 61 Conn. 451; *Lamm v. Chicago, S. P. etc. R.*, 45 Minn. 71. See also *Roush-lange v. Chicago & A. R.*, 115 Ind. 106.

part of it to a railroad company, which so built an embankment that the city was compelled to build a viaduct in the street to preserve its utility. The owner claimed compensation on account of the viaduct. The city urged that the deed to the company operated as a release. Judgment was given for the owner, as the viaduct was wholly distinct from the railroad, and could not have been considered in assessing compensation had the company condemned the land instead of purchasing it.¹ When, at the time of conveyance, consequential injuries are without redress, the consideration is not presumed to cover them. Hence if such injuries are inflicted after a liability for them has been imposed, the owner may have redress.² The operation of the rule may be qualified by the terms of the conveyance. Thus, where one conveys a railroad right of way over his land, but reserves the right to cross at any point, and stipulates that the rails shall be placed at a certain level, he reserves a permanent easement, and the successors of the company cannot freely raise the rails.³

§ 130. **Dedication.** — A corporation authorized to condemn property may usually accept it as a gift.⁴ The quantity which may be accepted may be larger than that which could have been condemned. Thus, where a road is to be sixty feet wide, and the commissioners are authorized to receive donations in aid of its construction, they may accept and use a strip of land of more than the statutory width.⁵

A question of special interest in respect to dedication arises when a claim for compensation is met by the assertion that the property in question is already vested in the public through dedication.⁶

Where land is affected by a public easement, it is evident that the owner of the fee cannot make a valid dedication of it to public use.⁷ But there is a difference of opinion as to the method of dedication in such case. Thus it has been held that

¹ *Tinker v. Rockford*, 137 Ill. 123.

⁵ *Hays v. Lewis*, 28 Ohio St. 326.

² *Wylie v. Elwood*, 134 Ill. 281.

⁶ See § 251.

³ *Chappell v. New York, N. H. & H. R.*, 62 Conn. 195.

⁷ *Detroit v. Detroit & M. R.*, 23 Mich. 173.

⁴ See *United States v. Fox*, 94 U. S. 315.

a railroad company may dedicate land for a highway.¹ On the other hand, it has been decided that the dedication should be the joint act of the corporation and the owner of the fee.² The difference between these decisions springs from the question whether or not the new use is an additional burden on the fee. Where an affirmative answer is returned the dedication must be joint.

§ 131. **Acquisition by Parol Agreement.** — According to the statute of frauds, an interest in land can be conveyed only by a writing signed by the party to be charged. What, then, is the status of the promoters of a public undertaking who have obtained possession of land under a parol license or agreement? In the first place, the existence of the license must be clearly proved.³ It is agreed that a license is always a justification of entry, and of all lawful acts between entry and revocation.⁴ It is agreed also that a license may be revoked at any time before it is acted upon.⁵ Beyond these points there is a difference of opinion. On the one hand, a parol license, though acted upon even to the extent of making permanent improvements at great cost, is held to be ever subject to the infirmity visited upon it by the statute of frauds.⁶ But if the subject of the license be such an easement as may be granted without deed, for example, the easement of an abutter in a highway, the license cannot be revoked after it has been acted upon.⁷ According to other decisions, however, a license acted upon becomes irrevocable.⁸ In

¹ *Detroit v. Detroit & M. R.*, 23 Mich. 173. See also *People v. Eel River, etc. R.*, 98 Cal. 665. See *Williams v. New York & N. H. R.*, 39 Conn. 509.

² *Green v. Canaan*, 29 Conn. 157. See *Strong v. Brooklyn*, 68 N. Y. 1.

³ *Eastern Pa. R. v. Schollenberger*, 54 Pa. 144; *Murdock v. Prospect Park & C. I. R.*, 73 N. Y. 579; *Rusch v. Milwaukee, L. & W. R.*, 54 Wis. 136.

⁴ *Harlow v. Marquette, H. & O. R.*, 41 Mich. 336; *Selden v. Delaware & H. Canal*, 29 N. Y. 634.

⁵ *People v. Goodwin*, 5 N. Y. 568; *Turner v. Stanton*, 42 Mich. 506. See *Merriam v. Meriden*, 43 Conn. 173.

⁶ *Hetfield v. Central R.*, 29 N. J. L. 571; *Beck v. Louisville, N. O. & T. R.*, 65 Miss. 172; *National Stock Yards v. Wiggins Ferry*, 112 Ill. 384; *Foot v. New Haven & N. Co.*, 28 Conn. 214; *Baltimore & H. R. v. Algire*, 63 Md. 319; *Irish v. Burlington & S. R.*, 44 Iowa, 380. See also *Barre R. v. Montpelier & W. R.*, 61 Vt. 1; *Murdock v. Prospect Park & C. I. R.*, 73 N. Y. 579.

⁷ *Hoch v. Metropolitan El. Ry.*, 59 Hun, 541. See also *Burkam v. Ohio & M. R.*, 122 Ind. 344; *Wolfe v. Covington & L. R.*, 15 B. Mon. 404; *Pratt v. Des Moines & N. R.*, 72 Iowa, 249.

⁸ *Baker v. Chicago, R. I. & P. R.*, 57 Mo. 265. See also *Cumberland Val.*

Cottrill v. Myrick,¹ it was held that where an act authorized commissioners to enter upon lands and make fishways, a parol assent to entry was binding even if an interest in land was involved, a deed being unnecessary as the act of the legislature was a matter of record. It has been suggested that the reason for the difference of opinion as to the status of a licensee is, that in States where irrevocability is maintained the law courts have equitable jurisdiction.² This is probably so, for the difference is, after all, generally one of method, as where the strict law of revocability is applied the licensee may upon revocation proceed to condemn, and may enjoin the owner from interfering with his possession pending the proceedings.³

After an occupation by consent the landowner cannot sue in tort, but must have recourse to the statutory action.⁴

§ 132. Where the promoters of a public work enter upon land and build without objection, they do not acquire any legal rights. But they may be benefited in this, that the owner may be estopped from enforcing his rights in order that the promoters may secure their possession by condemnation;⁵ and in this also, that in the event of condemnation their improvements will not be treated as a part of the owner's estate.⁶ Further, a subsequent ratification of their possession by the owner may relate back to entry. Thus, where proceedings to condemn, begun after an occupation without protest, were compromised and released, it was held that the corporation took title by the occupation, not by the proceedings. Therefore, one who had leased the property between the entry and the release was refused compensation, as the public easement antedated his lease.⁷

§ 133. **Acquisition by Prescription or Adverse Possession.** — Public rights in private property may be acquired by prescription or adverse possession.⁸ It has been held that a period of

R. v. McLanahan, 59 Pa. 23. See *Baltimore & H. R. v. Algire*, 65 Md. 337; *Maxwell v. Bay City Bridge*, 41 Mich. 453; *Marble v. Whitney*, 28 N. Y. 297.

¹ 12 Me. 222.

² See *Foot v. New Haven & N. Co.*, 23 Conn. 214.

³ See § 386.

⁴ *Cassidy v. Chicago & N. R.*, 70 Wis. 440.

⁵ See §§ 379, 382.

⁶ See § 239.

⁷ *Lawrence's Appeal*, 78 Pa. 365.

⁸ *Bumpus v. Miller*, 4 Mich. 159; *Sherlock v. Louisville, N. A. & C. R.*,

adverse possession is not commenced by the successful prosecution of a condemnation proceeding, not followed by actual possession of the land, for the reason that, such proceeding being summary and *in invitum*, the courts will not assume that the judgment has been paid in a case where possession has not been taken.¹ The fact that a corporation claiming title had at the time of entry the right to establish its position by making compensation, does not necessarily make its possession subordinate to the owner's rights.² Indeed it has been intimated that acquiescence is not to be presumed in respect to one who has no choice but to acquiesce, as is the case where property is taken for public use.³ When land taken by unlawful proceedings is held by adverse possession for the statutory period, the area affected is not necessarily conterminous with the part actually used, but is the whole tract against which the proceedings were directed.⁴

In a case where the possession originated in an entry of an experimental character, which was not supposed to affect private rights, the court said, "There was no conscious or intended adverse holding by the company and no conscious or intended submission by the plaintiff. While that mutual ignorance may not legally change the situation, it is an element in the conduct of the parties which must be taken into account."⁵

The possession on which the prescriptive right is based must be not only continuous, but continuous with respect to the very use for which it is claimed.⁶ This proposition is well illustrated in a recent case. A corporation built along a street an elevated railroad operated by cable. No compensation was paid to the

115 Ind. 22; *New York v. Carleton*, 113 N. Y. 284; *Eldridge v. Binghamton*, 120 N. Y. 309; *Miner v. New York, C. & H. R. R.*, 123 N. Y. 242; *Pierson v. Cincinnati & W. Canal*, 2 Disney (Ohio), 100; *Weld v. Brooks*, 152 Mass. 297; *Ely v. Parsons*, 55 Conn. 83; *Langdon v. State*, 23 Neb. 509. See also *Cowell v. Thayer*, 5 Met. 253; *Oliphant v. Commissioners*, 18 Kan. 386. See *Meyer v. Phillips*, 97 N. Y. 485.

¹ *Chicago & N. W. R. v. Galt*, 133 Ill. 657.

² *Am. Bank Note Co. v. New York El. Ry.*, 129 N. Y. 252. See also *Lehigh Val. R. v. McFarlan*, 43 N. J. L. 605.

³ *Jessup v. Loucks*, 55 Pa. 350.

⁴ *Cogsbill v. Mobile & G. R.*, 92 Ala. 252. See also *Hargis v. Kansas City, C. & S. R.*, 100 Mo. 210.

⁵ *Am. Bank Note Co. v. New York El. Ry.*, 129 N. Y. 252.

⁶ *Cotton v. Pocasset Man. Co.*, 13 Met. 429.

abutters, because it was not supposed that they had easements in the street. Afterwards, and during the alleged prescriptive period, the location of the road was somewhat altered to the increased disadvantage of the abutters, and steam-engines were substituted for the cable. The court held that the alterations broke the continuity of possession.¹ Where the state acquires a prescriptive right to divert water into a stream flowing through private land, it does not acquire a right in the soil, and, therefore, cannot enlarge the bed of the stream without paying compensation.²

Where it is enacted that a road used as a public highway for twenty years or more shall be a highway, proof that the public have travelled over it for twenty years is insufficient. The road must have been adopted or repaired by the public authorities.³

¹ *Am. Bank Note Co. v. New York El. Ry.*, 129 N. Y. 252.

² *Speir v. New Utrecht*, 121 N. Y. 420.

³ *Coleman v. State*, 134 N. Y. 564.

CHAPTER VII.

INTERFERENCES WITH PRIVATE PROPERTY IN FURTHER- ANCE OF PUBLIC PURPOSES.

§ 134. The chief object of this chapter is to determine the meaning of a taking of property by the right of eminent domain. The title chosen is sufficiently broad to cover all sorts of damage to property caused by the construction and operation of public works. A full understanding of the liabilities of the promoters of such works is essential to the comprehension of the narrower subject of a taking.

The exercise of the right of eminent domain necessarily effects a taking of property. The usual constitutional declaration expresses this in terms, as it requires compensation to be paid for property "taken" for public use. Taking property usually means getting possession of it. As far as the interest of the expropriator is concerned, this means getting, and paying for, just what property is needed for the public use, and no more. But to the property needed may be attached property which the expropriator does not want, perhaps cannot use, which indeed may be impaired, even destroyed, by the act of condemnation. Such property, whether it be an improvement belonging to the owner of the soil, or a franchise or easement belonging to another person, must be paid for.¹ It is *taken* by force of the appropriation of the land required. A *taking* then, in its simplest meaning, is the acquisition of property needed for public use, together with all its appurtenances.

The second accepted meaning of a taking carries the word beyond the idea of actual or presumed acquisition. Where part of a tract of land is acquired the whole is taken, in the sense that compensation must be paid for certain damage to the remainder.

¹ See § 74.

The difficult question is, whether the meaning of a taking shall be further extended, so as to cover certain damage to property not connected with that acquired. An affirmative answer will be assumed.

We have then these definitions of a taking: (a) the acquisition of property; (b) the damaging of property connected with that acquired; (c) the damaging of property not connected with that acquired.

ACQUISITION OF PROPERTY.

§ 135. A taking of the simplest and commonest sort is the physical acquisition of property for the purpose of using it in furtherance of public works. This, as we have seen, may be accompanied by the incidental taking of appurtenant rights.

But there may be other acts within the primary definition of a taking. Acquisition may be for use, and yet be not physical. Thus, if one is obliged to refrain from using his land in any way that will intercept the rays from a lighthouse lantern, there is a direct acquisition of a beneficial interest in the property.¹ So, an interest in land is directly acquired where a work is carried across it at an elevation.²

Acquisition may be physical, and yet not literally for use. Property may be taken in order to be destroyed for the public good.³

Finally, acquisition may be neither physical, nor for use. When a toll bridge is made free, a franchise is destroyed.⁴ The construction of a railroad in a street may directly take private easements.⁵ The vacation of a street may destroy private easements of access.⁶ It may be said, therefore, that wherever there is a direct assumption of dominion over private property, it is taken.

The reports contain many cases wherein statutes have been unsuccessfully assailed on the ground that they authorize a taking of property for public use without compensation. Several

¹ See *Chappell v. United States*, 34 Fed. Rep. 673.

⁴ See § 168.

² See *Jones v. Erie & W. R.*, 151 Pa. 30.

⁵ *Story v. New York El. R.*, 90 N. Y.

122. See also §§ 406, 416.

⁶ *Pearsall v. Supervisors*, 74 Mich.

³ See § 23.

558. See also §§ 409, 411.

classes of these statutes have been considered, and it appears that it is not a taking of property to tax it,¹ to affect it under the police power,² to subject it to certain rules in respect to devolution,³ nor to regulate rights held in common.⁴ Where the government, in treating with a foreign power, surrenders a claim of one of its citizens against the foreign state, it does not take the property of the claimant.⁵ The owner of farm land is not deprived of any property by reason of its inclusion within the boundaries of a city.⁶

DAMAGE TO PROPERTY CONNECTED WITH THAT ACQUIRED.—
OCCUPATION OF PART OF A TRACT.

§ 136. The rule, that where part of a tract of land is acquired for public use the whole is taken, in the sense that compensation must be paid for certain damage to the remainder, is widely approved.⁷ Detailed consideration of injuries to the remainder of a tract is deferred to the chapter on Compensation, for these are rarely independent injuries, but are simply elements which go to swell the amount of compensation. In determining these elements, a more liberal rule is frequently adopted than that which governs the definition of liability in the case of damage to property untouched by the works. Where a corporation condemns part of a tract it is compelled, usually, to compensate for pretty much all the effects of construction and operation which can be fairly said to lessen the value of the remainder. For example, while the owner of property near to, but not touched by, a railroad may not be allowed compensation on account of risk of fire,⁸ he may have the risk considered when a part of a tract is taken.⁹ The following reason for the distinction is sug-

¹ See §§ 24, 25.

² See § 23.

³ See § 26.

⁴ See § 27.

⁵ *Meade v. United States*, 9 Wall. 691, overruling s. c. 2 Ct. Cl. 224. See *Jones v. Walker*, 2 Paine C. C. 688.

⁶ *Callen v. Junction City*, 43 Kan. 627.

⁷ *Edmonds v. Boston*, 108 Mass. 535; *Vicksburg, S. & P. R. v. Dillard*, 35

La. An. 1045; *New York, L. & W. R.*, 27 Hun, 151; *Springfield & S. R. v. Calkins*, 90 Mo. 538; *Hyde Park v. Dunham*, 85 Ill. 569; *Wilmes v. Minneapolis & N. R.*, 29 Minn. 242; *Sullivan v. Supervisors*, 58 Miss. 790; *Bangor & P. R. v. McComb*, 60 Me. 290; *Watson v. Pittsburg & C. R.*, 37 Pa. 469. See §§ 189, 190.

⁸ See § 147.

⁹ See § 259.

gested in a leading English case:¹ "Where however the mischief is caused by what is done on the land taken, the party seeking compensation has the right to say it is by the act of Parliament and the act of Parliament only that you have done the acts which caused the damage. Without the act of Parliament everything you have done and are about to do in the making and using of the railway would have been illegal and actionable, and is therefore matter for compensation." . . .

DAMAGE TO PROPERTY NOT CONNECTED WITH THAT
ACQUIRED. — RULE THAT PERSONS ACTING UNDER
LEGISLATIVE AUTHORITY ARE NOT RESPONSIBLE FOR
CONSEQUENTIAL INJURIES.

§ 137. Where the promotion of a public use causes damage to property other than that acquired in whole or in part, questions arise as to the existence and extent of liability, which are among the most important and difficult pertaining to our subject. Is the act a taking? Is it a common-law trespass? If the latter, is it legitimated by the authorization of the state? These points will be considered under the comprehensive question: For what damage to property, not connected with that acquired, is the state, or its agent, liable, in the absence of an express constitutional or statutory declaration of liability for consequential injuries?

There is a familiar rule to the effect that, where persons authorized to prosecute a certain work act within their authority, and with due care and skill, they are not responsible at common law for consequential damage to property.² In England the rule can be applied to any case. As Lord Blackburn has said:³ "No action can be maintained for anything which is done under the authority of the legislature, though the act is one which, if unauthorized by the legislature, would be injuri-

¹ *Stockport, T. & A. R.*, 33 L. J. 136 Mass. 239; *Beseman v. Pennsylvania R.*, 50 N. J. L. 235; *Governor, etc. v. Meredith*, 4 T. R. 794.

² *Transportation Co. v. Chicago*, 99 U. S. 635; *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195; *Benner v. Atlantic Dredg-*

ing Co., 134 N. Y. 156; *Sawyer v. Davis*, ³ *Caledonian R. v. Walker's Trustees*, 7 App. Cas. 259.

ous and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him."

In the United States it will appear that the rule cannot be applied where the injury amounts to a taking of property within the constitutional declaration. Indeed, there is some disposition to doubt the power of an American legislature to authorize any nuisance without compensation.¹ So, it has been said that "the legislature may authorize small nuisances without compensation, but not great ones."² But according to the specific provisions of the constitutions, which do not expressly require compensation for property damaged for public use, it is only a *taking* of property that cannot be authorized without liability. Now in none of the cases cited was the broad proposition that every nuisance is a taking necessary to the decision, even if it were suggested in the opinion. These opinions should be viewed as merely advanced expressions of that liberal definition of private rights in the face of state power, which, as will be presently shown, has so greatly modified the original harshness of the rule.

§ 138. The grant of a privilege by the state does not necessarily bring the grantee within the purview of the rule. Thus, where the state, having but the sovereign control over a stream in the interests of navigation, grants to a private proprietor the right to build a dam, or alter the course of the stream upon his own land, the grantee is in no sense a public agent. He is a beneficiary under a private statute, and cannot plead it in justification of the flooding of adjacent property. He is a private person lawfully using his own, and responsible under the common law for such injury as he may inflict upon his neighbor.³ Nor does the mere fact that an undertaking is of public benefit, or is a business "affected with a public interest," in that it is

¹ See *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317; *Pennsylvania R. v. Angel*, 41 N. J. Eq. 316; 239. *Cogswell v. New York, N. H. & H. R.*, 103 N. Y. 10; *Eaton v. Boston, C. & M. R.*, 51 N. H. 504; *Hare*, Am. Const. Law, ii. 756.

² *Bacon v. Boston*, 154 Mass. 100.

See also *Sawyer v. Davis*, 136 Mass.

³ *Crittenden v. Wilson*, 5 Cowen,

165; *Sinnickson v. Johnson*, 17 N. J. L.

129.

obliged to serve all customers at reasonable rates,¹ make its promoters public agents. Public agents are those to whom public powers are confided.² Hence, a gas company, not invested with the right to condemn, cannot plead authority in bar of an action on account of a nuisance caused by the operation of its works.³

§ 139. It has been held that all persons and corporations authorized by the state enjoy the protection of the rule; that there is no distinction, for example, between the road-board laying out highways with public funds, and the corporation building a railroad with private funds.⁴ On the other hand, there are opinions in which a line is drawn between political and private corporations, the former being within the rule, the latter not.⁵ Thus in *Benner v. Atlantic Dredging Company*,⁶ the defendants, acting under the authority and for the benefit of the United States, blasted rock with due care and skill, but in so doing damaged the plaintiff's property by vibration. Judgment was given for the defendants, and the earlier decision in *Cogswell v. New York, New Haven & Hartford Railroad Company*,⁷ was distinguished on the ground that it imposed a liability upon a private corporation.

If this distinction rests simply upon the proposition that authority to inflict consequential damage is more readily inferred in the case of a political corporation, than where a private corporation is concerned, it is correct.⁸ But if a radical distinction is meant, it does not seem tenable. Whatever be the constitutional limitations upon the power to affect private property in the public interests, they restrain the state as strictly as the corporations which it creates. Beyond these limitations, the

¹ See § 18.

² See *Metropolitan Asylum Dist. v. Hill*, 6 App. Cas. 193. See also § 97.

³ *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18.

⁴ *Bellinger v. New York Cent. R.*, 23 N. Y. 42. See also *Beseman v. Pennsylvania R.*, 50 N. J. L. 235.

⁵ *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317; *Booth v. Rome, W. & O. R.*, 140 N. Y. 267; *Tinsman v.*

Belvidere & D. R., 26 N. J. L. 148;

Pennsylvania R. v. Angel, 41 N. J. Eq. 316. See also *Sutton v. Clarke*, 6

Taunt. 29; *Baltimore & P. R. v. Reaney*, 42 Md. 117; *Transportation Co. v. Chicago*, 99 U. S. 643; *Alexander v.*

Milwaukee, 16 Wis. 247.

⁶ 134 N. Y. 156.

⁷ 103 N. Y. 10.

⁸ See § 142.

legislature is free to regulate the liability of those who promote public uses. There is no reason, in law, why a private corporation should not be deemed capable of receiving the protection that can be accorded to a political corporation. Take the extreme but supposable case of two railroads, one operated by public authorities, the other by a private corporation. Must the legislature discriminate against the latter in respect to liability? The propriety of according equal protection is, in most cases, more than doubtful, but the power to accord it cannot be denied without imposing an extra-constitutional limitation upon the legislature. Assuming then that the legislature can legalize an act which, in the absence of authorization, would create a common-law nuisance, there seems to be no ground, on principle, for restricting the beneficiaries to political corporations.

Is the Damage Authorized?

§ 140. Wherever the authority of a statute is pleaded in defence to an action for consequential injury, its existence and sufficiency must be clearly shown. Where the legislature authorizes a thing to be done, which can be fairly accomplished without creating a nuisance, it will be assumed that the legislature intends that it shall be done in that way.¹ Thus the authority given to a city to construct sewers does not permit the maintenance of an avoidable nuisance.²

The statute may be so worded as to grant a conditional authority to do a thing, — to do it, if it can be done without creating a nuisance.³

A statute may contain a warrant for the doing of a thing sufficient to protect the actor from indictment for a nuisance, and yet insufficient to bar a private suit for damages. That

¹ *Eames v. New England Worsted Co.*, 11 Met. 570; *Sawyer v. Davis*, 136 Mass. 239; *Morse v. Worcester*, 139 Mass. 389; *Cogswell v. New York, N. H. & H. R.*, 103 N. Y. 10; *Hudson River Tel. Co. v. Watervliet R.*, 61 Hun, 140; *Edmondson v. Moberly*, 98 Mo. 523; *Pasadena v. Stimson*, 91 Cal. 238; *Jones v. Festiniog R.*, L. R. 3 Q. B. 733; *Gas Light, etc. Co. v. Vestry of St. Mary Abbott's*, 15 Q. B. D. 1; *Met. Asylum Dist. v. Hill*, 6 App. Cas. 193. ² *Haskell v. New Bedford*, 108 Mass. 208. ³ *Bacon v. Boston*, 154 Mass. 100; *Dubach v. Hannibal & S. J. R.*, 89 Mo. 483; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436.

is to say, the public may be willing to suffer a detriment for the sake of a presumably greater advantage, and yet concede the right to redress to one suffering special damage.¹ Thus the state's permission to build a dam across a stream fully protects the builder from indictment for an interference with public rights therein, but does not affect his liability to one whose lands are flooded.²

§ 141. **Express Authority.**—There are a few cases where a particular nuisance is held to be expressly authorized by the legislature. In a recent English case,³ a corporation was empowered to buy a particular tract of land for a cattle-yard. The resulting nuisance was declared to be expressly authorized, as the place was designated.⁴ Where the ringing of a factory bell had been adjudged a nuisance, a statute subsequently passed permitting such bells to be rung was successfully pleaded in bar of an action.⁵

§ 142. **Implied Authority.**—Where authority to create a nuisance exists it is usually inferential. According to some decisions, the rule for the detection of the legislative authority is simple enough,—given the authorization of a work of public purpose, and we have the authorization of all damages not due to negligent or improper construction.⁶ Thus, where a company carefully built a railroad, but by so doing caused the flooding of the plaintiff's land, the damage was declared to be without remedy, as it resulted from the authorized construction of the work.⁷

The broad test of legislative authority adopted in the decisions just cited is not generally approved by the best judicial opinion of the present time. When the main rule in respect to the immunity of public agents came into being, public undertakings

¹ See *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317; *Snell v. Buresh*, 123 Ill. 151. ⁴ See *Met. Asylum Dist. v. Hill*, 6 App. Cas. 193.

² *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Crittenden v. Wilson*, 5 Cowen, 165. ⁵ *Sawyer v. Davis*, 136 Mass. 239. ⁶ *Philadelphia & T. R.*, 6 Whart. 25; *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101; *Moyer v. New York Cent. & H. R. R.*, 88 N. Y. 351.

³ *London B. & S. C. R. v. Truman*, 11 App. Cas. 45, reversing s. c. L. R. 29 Ch. D. 89. ⁷ *Bellinger v. New York Cent. R.*, 23 N. Y. 42.

were comparatively few, and rarely disturbed the enjoyment of neighboring property. Moreover, these undertakings were usually promoted by the public authorities. But during the present century the list of public works has been lengthened, and the range and severity of consequential damage greatly increased. A further change from the old condition is evidenced by the ubiquity of private corporations promoting public works, especially railroads. It will appear that this radical change in physical and economic conditions has brought about, in most jurisdictions, a narrower definition of the damage for which the public agent is not liable.¹

Further, the change has warranted a closer scrutiny in respect to authorization, even in cases where immunity can be conferred. Although we do not admit a radical distinction between political and private corporations in their capacity to receive legislative protection,² yet the intent to protect may be more readily inferred in the former case. The private corporation takes the initiative, usually for its own profit. It is a voluntary agent, and acquires public powers by petition, or compliance with the terms of a statute. The political corporation usually performs a duty cast upon it by the public.

A distinction has even been drawn between public corporations according as the promotion of the undertaking is discretionary, or mandatory. Thus, in *Managers of the Metropolitan Asylum District v. Hill*,³ the managers were authorized to purchase land within a certain district for a small-pox hospital. A site having been selected, an owner of neighboring property applied for an injunction. The court assumed that the hospital would be a nuisance, and granted the injunction because the statute did not authorize the creation of a nuisance. Said Lord Watson, "Where the terms of the statute are not imperative but permissive; when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend

¹ See §§ 146-152.

² 6 App. Cas. 193.

³ See § 138.

to confer license to commit nuisance in any place which might be selected for the purpose."¹

§ 143. The inferential authority pleaded in bar of an action must cover two points, the act complained of, and its commission at the place in question. It has been said that there is no statutory authority, unless "it can be fairly said that the legislature contemplated the doing of the very act which occasioned the injury."² Engine-houses, freight and cattle yards, etc., may be necessary adjuncts to a railroad, yet, if they are so located in a town as to cause injury to neighboring property, it has been held that their obvious convenience from the standpoint of the corporation will not raise the presumption that the legislature intended that they should be thus located.³ Where a city is authorized to condemn land within a district for a sewer and sewerage works, it is not thereby authorized to locate the works where they will create a nuisance.⁴ A plank-road corporation was authorized to erect toll gates "as such corporation shall deem suitable to its interests," but the court held that it was not authorized to put up a gate at a point where it actually damaged the plaintiff's property.⁵

What is "Due Care and Skill"?

§ 144. The rule is emphatic in denying protection where the damage results from the negligent or improper use of powers.⁶ The requirement of due care and skill should be observed by the manifestation of these qualities in the actual prosecution of the work, — that is, whatever is done should be done properly; and,

¹ See also *Morton v. New York*, 140 N. Y. 207.

² *Cogswell v. New York*, N. H. & H. R., 103 N. Y. 10. See also *Bohan v. Point Jervis Gas Light Co.*, 122 N. Y. 18; *Hill v. New York*, 139 N. Y. 495.

³ *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317; s. c. 137 U. S. 568; *Methodist Church v. Pennsylvania R.*, 48 N. J. Eq. 452; *Cogswell v. New York*, N. H. & H. R., 103 N. Y. 10; *Wylie v. Elwood*, 134 Ill. 281; *Trook v. Baltimore & P. R.*, 3 MacArthur (D. C.), 392. See also *Tuebner v. California St.*

R., 66 Cal. 171; *Pennsylvania R. v. Angel*, 41 N. J. Eq. 316; *Shively v. Cedar Rapids*, I. F., etc. R., 74 Iowa, 169. See *Pennsylvania R. v. Lippincott*, 116 Pa. 472; *Beseman v. Pennsylvania R.*, 50 N. J. L. 235; *Illinois Cent. R. v. Grabill*, 50 Ill. 241.

⁴ *Bacon v. Boston*, 154 Mass. 100.

⁵ *Snell v. Buresh*, 123 Ill. 131.

⁶ *Henry v. Pittsburgh & A. R.*, 8 W. & S. 85; *Leader v. Moxon*, 3 Wils. 461. See also *Baltimore & P. R. v. Reaney*, 42 Md. 117.

further, the plan of construction should not be defective. A corporation may be liable not only for the improper execution of a good plan, but also for the proper execution of a bad one.

The cases bearing on the first point simply involve the law of negligence, and need not be considered here. As to the second point, it is generally held that a political corporation exercising its discretionary power in the promotion of public works, is not liable for damage consequent on the adoption of an injudicious plan of construction.¹ Thus, a city is not responsible for an injury to land due to the construction of a sewer on a defective plan.² But the immunity of a political corporation in this respect does not, of course, cover injuries which amount to a taking of property.³

§ 145. Private corporations are bound to promote their undertakings according to such plans, and with such appliances, as will at once effectuate the public purpose in hand, and comport with a reasonable regard for the property of others.⁴ This obligation must be specially construed in each case, for its weight depends wholly on circumstances. But in no case should it impose on the corporation an expense which would prevent the construction of the undertaking, or even cripple its earning capacity. How far a corporation is bound to keep abreast of the times, in the matter of improvements in construction, is a question of some difficulty. Of course, the state may, by virtue of its police power, compel the adoption of means necessary for the protection of property.⁵ But in the absence of statutory direction, it seems that a corporation is not liable, on the score of negligence, for an injury to property resulting from the adoption of plans

¹ *Child v. Boston*, 4 Allen, 41; *Fair v. Philadelphia*, 88 Pa. 309; *Bear v. Allentown*, 148 Pa. 80; *Mills v. Brooklyn*, 32 N. Y. 489; *Paine v. Delhi*, 116 N. Y. 224. See *Seymour v. Cummins*, 119 Ind. 148.

² *Johnston v. District of Columbia*, 118 U. S. 19.

³ *Siefert v. Brooklyn*, 101 N. Y. 136. See also *New Albany v. Ray*, 3 Ind. App. 321; *Butchers' Ice Co. v. Philadelphia*, 27 Atl. Rep. 376 (Pa. 1893);

Dillon, Mun. Corp. (4th ed.), § 1051. See *Boston Belting Co. v. Boston*, 149 Mass. 44.

⁴ *McCleneghan v. Omaha & R. V. R.*, 25 Neb. 523; *Spencer v. Hartford, P. & F. R.*, 10 R. I. 14; *Adams v. Railroad Co.*, 110 N. C. 325; *Sherlock v. Louisville, N. & C. R.*, 115 Ind. 22. See *O'Brien v. Baltimore Belt R.*, 74 Md. 363; *Proprietors of Locks & Canals v. Nashua & L. R.*, 10 Cush. 385.

⁵ See § 15.

and appliances which, though not perhaps the least harmful of those in actual use, are yet not radically inferior to the best, and have the sanction of general usage.¹

What is Meant by "Damage"?

§ 146. This is the most important question raised by the rule under consideration. The answer must be prefaced by a brief consideration of common-law rights and liabilities in respect to the use of property. The command, *sic utere tuo ut alienum non lædas*, and the rule of public law that the state may regulate, tax, or take private property in the public interest, broadly define the position of the property owner. Private rights in property are qualified only by the duties of respecting the rights of one's neighbor, and yielding to the necessities of the commonwealth. The case of damage resulting from an unlawful use of property need not be considered. We are concerned only with the cases where the lawful use of one's own inflicts injury upon the property of his neighbor. If such use is a natural use, that is, the use of land in its natural state, it is usually held that resulting damage does not constitute a legal injury. Thus, if one dig a shaft or a well on his own land, and thereby cause the subsidence of a spring or well on other land, there is not a legal wrong.² The Supreme Court of Pennsylvania has recently reversed a former decision, and has decided that where the necessary consequence of mining coal is the pollution of streams the riparian owners have no right of action.³ According to the civil law, the effects of the natural flow of surface-water must be borne by the lower proprietor without redress, and if he so deal with his property as to divert or obstruct the flow, he is liable.⁴ The rule of the civil law obtains in several States.⁵ According to the common law, one may protect his property from the natural flow of surface-

¹ See *Nat'l Tel. Co. v. Baker* (1893), 2 Ch. 186; *Hudson River Tel. Co. v. Watervliet R.*, 135 N. Y. 393; *Morse v. Worcester*, 139 Mass. 389. ³ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126.

⁴ *Corp. Jur. Civ.*, 39 Tit. 3 §§ 2-5; *Code Napoléon*, Art. 640.

² *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 349. ⁵ *Hooper v. Wilkinson*, 15 La. An. 497; *Gormley v. Sandford*, 52 Ill. 158.

water.¹ Where one makes an artificial use of his property he does it at his peril, in this, that if the use causes injury to other property he is liable. For example, one may not artificially discharge surface-water upon another's land,² nor build a dam which sets back water beyond his own boundaries.³

Cases which should be considered apart from those cited, are those where the damage is not the proximate result of the artificial use itself, but is caused by an accident, barring which the use would have remained harmless. In *Rylands v. Fletcher*,⁴ the defendant had lawfully and carefully built a reservoir, but, owing to a latent defect in the soil, the water escaped and flooded the plaintiff's mine. In giving judgment for the plaintiff this broad proposition was stated, "If a person brings or accumulates on his land anything, which if it should escape, may cause damage to his neighbors, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precaution he may have taken to prevent the damage."⁵ The doctrine of *Rylands v. Fletcher* has been repudiated in several decisions in this country,⁶ the governing principle of which is fairly stated in *Losee v. Buchanan*.⁷ "No one can be made liable for injuries to the person or property of another without some fault or negligence on his part."

How far do these common-law rules help to define the duties of promoters of public uses in respect to the property of others? It will be assumed that ordinary occupants of land and promoters of public uses are on a plane in this, that each put their land to uses lawful in themselves. Also, that the latter owe no greater common-law duty towards their neighbor than is imposed upon the former.⁸ The question is whether the duties are the same in each case. The general answer must be returned that

¹ *Barkley v. Wilcox*, 86 N. Y. 140; *Murphy v. Kelley*, 68 Me. 521.

² *Barkley v. Wilcox*, 86 N. Y. 140. See also *Miller v. Laubach*, 47 Pa. 154; *Jackman v. Arlington Mills*, 137 Mass. 277.

³ See *Pixley v. Clark*, 35 N. Y. 520.

⁴ L. R., 3 H. L. Cas. 330, affirming a. c. L. R. 1 Ex. 265.

⁵ See also *Mears v. Dole*, 135 Mass. 508.

⁶ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126; *Marshall v. Welwood*, 38 N. J. L. 339. See also *Garland v. Towne*, 55 N. H. 55. See also *Nat'l Tel. Co. v. Baker* (1893), 2 Ch. 186.

⁷ 51 N. Y. 476.

⁸ See § 154.

such promoters occupy a more favorable position, unless it can be shown that the injury in question is unauthorized, or, in cases arising in this country, that it amounts to a taking of property.

§ 147. **Physical Interference.** — In some decisions a taking has been strictly limited to the acquisition of property for public use, and any damage, no matter how appreciable and permanent, inflicted upon other property, has been considered to be beyond the purview of the constitutional declaration.¹ Thus, redress has been refused for the flooding of land due to the construction of a public work upon neighboring property,² and for damage of every sort due to alterations in the grade of streets.³

The injustice of this limitation, distinguishing as it does between an assumption of dominion over property, and leaving a dominion over an altered and perhaps useless property, has provoked many constitutional and statutory enactments looking to a broader definition of private rights,⁴ and, what is pertinent here, has led in many jurisdictions to a more liberal definition of a *taking*. In *Pumpelly v. Green Bay Canal Company*,⁵ it was decided that where land is "actually invaded by super-induced additions of water, earth, or other materials, . . . so as effectually to impair its usefulness," it is *taken*.⁶

The Court of Claims have made recently an important comment on the rule in *Pumpelly's* case. The quarrying of stone for public works caused the flooding of neighboring land. The court recognized the rule, but found it inapplicable to the case at bar because the injury was temporary, and not the probable or necessary consequence of the work.⁷ It is true that the consequential injuries within the rule may be in some sense beneficial to the public work. True also, that the injuries are frequently probable and necessary consequences of the work. But we cannot accept these accidental results of construction as entering into the principle of the rule itself. The rule is framed

¹ *Philadelphia & T. R.*, 6 Whart. 25.
See *Woodruff v. Catlin*, 54 Conn. 277.

⁴ See §§ 153-158.

⁵ 13 Wall. 166.

² *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101; *Bellinger v. New York Cent. R.*, 23 N. Y. 42; *Moyer v. New York Cent. & H. R. R.*, 88 N. Y. 351.

⁶ See also the learned and exhaustive opinion in *Eaton v. Boston, C. & M. R.*, 51 N. H. 504.

⁷ *McIntyre v. United States*, 25 Ct. Cl. 200.

³ See § 398.

solely in the interest of the property owner. It should be applied wherever the injury falls within its terms.

§ 148. The rule in *Pumpelly's* case represents the prevailing opinion.¹ Thus, land is taken when it is flooded by reason of the erection of dams, embankments, or other obstructions to the natural course of waters.² But the proprietors of a dam cannot be held responsible for the flooding of a tract one hundred and twenty-five miles below, where the proximate cause of injury is a dam much nearer the tract.³

It may happen that the construction of public works may cause a freshet to inflict greater damage to property than it would have done had the works not been built, and even to flood land which, but for the works, would have been unharmed. In neither case can the owner recover when the works are properly constructed. The cause of injury is beyond human foresight, and therefore beyond human responsibility.⁴ But where the flood, though unusual, works the injury in question by reason of the defective construction of the public work, its unusuality cannot be pleaded in defence.⁵ A flood which is periodic, and therefore to be apprehended, is not within the rule, for it should have been taken into account in constructing the works.⁶

§ 149. Where a corporation promoting a public work intentionally discharges surface-water upon other land, it is liable.⁷

¹ *Miles v. Worcester*, 154 Mass. 511, *McPherson v. St. Louis I. & S. R.*, 97 Mo. 253; *Baltimore & O. R. v. School Dist.*, 96 Pa. 65; *Gulf C. & S. R. v. Pool*, 70 Tex. 713; *Sprague v. Worcester*, 13 Gray, 193. See also *Allen v. Chippewa Falls*, 52 Wis. 430. See *Countess of Rothes v. Kircaldy Waterworks Comm.*, 7 App. Cas. 694.

² *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Hooker v. New Haven & N. Co.*, 14 Conn. 146; *Lehigh Val. R. v. McFarlan*, 31 N. J. Eq. 706; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. See also *McKee v. Delaware & H. Canal*, 125 N. Y. 353; *Cumberland v. Willison*, 50 Md. 138; *Sullens v. Chicago, R. I. & P. R.*, 74 Iowa, 659; *Henry v. Vermont Cent. R.*, 30 Vt. 638. See *McIntyre v. United States*, 25 Ct. Cl. 200. See § 421.

³ *Sumner v. Richardson Lake Dam*, 71 Me. 106. See also *Payne v. Kansas City, S. J. & C. R.* 112 Mo. 6.

⁴ *Moore v. Los Angeles*, 72 Cal. 287; *Seifert v. Brooklyn*, 101 N. Y. 136; *McKenzie v. Mississippi & R. Boom Co.*, 29 Minn. 288.

⁵ *West Orange v. Field*, 37 N. J. Eq. 600; *Soule v. Passaic*, 47 N. J. Eq. 28; *Miller v. Morristown*, 47 N. J. Eq. 62; *McCormick v. Kansas City S., etc. R.*, 70 Mo. 359; *Pye v. Mankato*, 36 Minn. 373; *Noonan v. Albany*, 79 N. Y. 470;

⁶ *Moore v. Los Angeles*, 72 Cal. 287; *Seifert v. Brooklyn*, 101 N. Y. 136;

But it is generally held, that there is not a taking of property where land is subjected to an increased volume of surface-water by reason of the construction of public works on adjoining land. The proper construction of the work is to be viewed as a reasonable use of one's own land, and a consequential alteration in the direction and volume of surface-water does not constitute, therefore, a legal injury.¹ Thus, where the building of a railroad over a prairie country necessitates the laying of rails on an embankment made by throwing up earth from the edges of the right of way, the corporation is not liable for the escape of surface-water from the trenches excavated.² So, a city, properly altering the grade of streets, is not liable on account of the incidental collection and distribution of surface-water.³

§ 150. It is a taking of land to cast upon it sewage,⁴ or earth and stone.⁵

Where the pressure of a railroad embankment forces up the soil of neighboring property, the corporation is liable.⁶

The reasonable purity of water is incident to a right of property therein. If this quality is impaired, as a direct consequence of the promotion of public works, the owner may have redress. Hence one may have redress for the discharge of sewage into his stream,⁷ or the substitution of water from a canal for the pure

Troy v. Coleman, 58 Ala. 570; Patoka Township v. Hopkins, 131 Ind. 142; Minn. 172.

Young v. Comm., 134 Ill. 569; Whaley v. Lancashire & Y. R., 13 Q. B. D. 131. See Johnson v. Chicago S. P., etc. R., 80 Wis. 641.

¹ Hill v. Cincinnati W. & M. R., 109 Ind. 511; Morrison v. Bucksport & B. R., 67 Me. 353; Cumberland v. Willison, 50 Md. 138; Wakefield v. Newell, 12 R. I. 75; Henderson v. Minneapolis, 32 Minn. 319; O'Connor v. Fond du Lac, A. & P. R., 52 Wis. 536; Waters v. Bay View, 61 Wis. 642; Atchison T. & S. F. R. v. Hammer, 22 Kan. 763. See also Cassidy v. Old Colony R., 141 Mass. 174. But see Drake v. Chicago, R. I. & P. R., 63 Iowa, 302; Hurdman v. North Eastern R., L. R. 3 C. P. D. 168; Nevins v. Peoria, 41 Ill. 502; Jacksonville N. & S. R. v. Cox, 91 Ill. 500.

² Jordan v. St. Paul M. & M. R., 42 Minn. 172.

³ Durkes v. Town of Union, 38 N. J. L. 21; Corcoran v. Benecia, 96 Cal. 1.

⁴ Winn v. Rutland, 52 Vt. 481; Beach v. Rochester, 22 Hun, 158; Jacksonville v. Lambert, 62 Ill. 519; Butler v. Thomasville, 74 Ga. 570; Smith v. Atlanta, 75 Ga. 110. See also Duryea v. New York, 26 Hun, 120; New York Cent. & H. R. v. Rochester, 127 N. Y. 591.

⁵ Eaton v. Boston C. & M. R., 51 N. H. 504; Myers v. St. Louis, 82 Mo. 367; Keating v. Cincinnati, 38 Ohio St. 141.

⁶ Costigan v. Pennsylvania R., 54 N. J. L. 233; Roushange v. Chicago & A. R., 115 Ind. 106. See Reardon v. San Francisco, 66 Cal. 492.

⁷ Hooker v. Rochester, 37 Hun, 181.

water used for bleaching purposes.¹ But the degree of purity to which the possessor of property in water is entitled, depends somewhat upon the environment. Thus, a stream running through a populous town may be necessarily so contaminated that it is only useful for drainage and water-power. In such case the interest of a riparian proprietor is not impaired because sewers empty into the stream.²

An encroachment upon land may be a taking, though not distinctly appreciable. Thus, the encroachment of water by percolation has been declared a taking of the land affected.³

§ 151. In the cases cited thus far, the physical interference has been limited to an invasion of land, amounting in some cases to what Justice Miller has called "a practical ouster of possession."⁴ In the case just mentioned, Justice Miller recognizes the rule in *Pumpelly's case*,⁵ with the comment, that it is perhaps the "extremest qualification of the doctrine" of the *Governor & Co. of The British Cast Plate Manufacturers v. Meredith*.⁶ But this *dictum* does not necessarily discredit a slight addition to the rule, so that it shall cover the physical alteration or destruction of property by reason of an act which cannot be deemed an encroachment. This addition is warranted by well-considered judgments. Thus, where an aqueduct company so built a filter gallery on their own land that the water of a neighboring pond was lowered by percolation, the water was said to be taken.⁷ There is also a taking by subtraction, where a railroad corporation so deals with its own property as to cause the caving in of adjacent soil.⁸

¹ *Acquackanonck Water Co. v. Watson*, 29 N. J. Eq. 366.

² *Merrifield v. Worcester*, 110 Mass. 216.

³ *Wilson v. New Bedford*, 108 Mass. 261. See *Pixley v. Clark*, 35 N. Y. 520.

⁴ *Transportation Co. v. Chicago*, 99 U. S. 635.

⁵ 13 Wall. 166.

⁶ 4 T. R. 794.

⁷ *Proprietors of Mills v. Braintree Water Co.*, 149 Mass. 478. See also *Heilbron v. Canal Co.*, 75 Cal. 426;

Ulbricht v. Eufala Water Co., 86 Ala. 587; *Emporia v. Soden*, 25 Kan. 588.

See *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Elster v. Springfield*, 49 Ohio St. 82; *United States v. Alexander*, 148 U. S. 186.

⁸ *Richardson v. Vermont Cent. R.*, 25 Vt. 465; *McCullough v. St. Paul, M. & M. R.*, 53 N. W. Rep. 802 (Minn. 1892). See also *Ludlow v. Hudson River R.*, 6 Lans. 128. But see *Boothby v. Androscoggin & K. R.*, 51 Me. 318.

§ 152. We have now to consider damage which does not amount necessarily to encroachment or subtraction, but which may, nevertheless, affect the use and enjoyment of property. In *Trenton Water Power Co. v. Raff*,¹ it was said, "Whether you . . . pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property."² But in a recent case in New Jersey,³ the first of its kind in this State, the plaintiff, whose dwelling was situated a few feet from a railroad, sought redress for damage due to smoke, vibration, noise, and odors resulting from the operation of the road. It did not appear that the damage was due to improper management, or that the operation of the road at that place was unauthorized. The question was simply whether one, occupying property near a railroad, could recover for damage necessarily resulting from the operation of the road. It was held that he could not recover. Similar limitations of the responsibilities of railroad companies have been declared in other decisions.⁴

SPECIAL LIABILITY UNDER CONSTITUTION OR STATUTE.

§ 153. When Parliament enacted the comprehensive Lands Clauses Consolidation Act in 1845, it provided that compensation should be paid for lands "injuriously affected by the execution" of authorized works, as well as for lands taken. The same provision generally appears in other statutes conferring compulsory powers.

In this country a liability for injuries beyond a taking is imposed by most of the later State constitutions.⁵ Although the

¹ 36 N. J. L. 335. See also *Pennsylvania R. v. Angel*, 41 N. J. Eq. 316.

² See also *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317; *Cogswell v. New York, N. H. & H. R.*, 103 N. Y. 10.

³ *Beeseman v. Pennsylvania R.*, 50 N. J. L. 235, affirmed without opinion in 52 N. J. L. 221.

⁴ *Carroll v. Wisconsin Cent. R.*, 40 Minn. 168. See also *Sawyer v. Davis*, 136 Mass. 239; *Shealy v. Chicago, M. & N. R.*, 77 Wis. 633.

⁵ *Alabama* (1875), xiii. 7: "Municipal and other corporations and individuals . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of its works," etc. Same provision in *Pennsylvania* (1873), i. 8. *Arkansas* (1874), ii. 22: "Private property shall not be taken, appropriated, or damaged," etc. *California* (1879), i. 14: "Private property shall not be taken or damaged," etc. Same provision in *Georgia* (1877), i. 3; *Illinois* (1874) ii.

governing constitution is silent, the legislature may nevertheless impose a liability for consequential injuries upon public agents.¹ Where these liabilities are imposed in an original grant of power, they are valid as organic conditions. Where they are imposed upon existing corporations, they are usually held to be within the reserved power to amend or alter charters.²

§ 154. The first query suggested by the legislation in question, is whether it imposes a liability coincident with that at the common law.³ In a recent decision in Nebraska,⁴ it was held, that injuries in fact, as distinguished from legal injuries, were covered by the constitutional declaration. The effect of this opinion is to make mere depreciation in the market value of property evidence of a substantive injury.

The weight of authority is decidedly against this position. In England, it has been held that the damage must be at least such as would be actionable at common law.⁵ In this country, a common-law liability has been fixed where the constitution or statute requires payment for property damaged or injuriously affected;⁶ for "all damages occasioned by the laying out, making and maintaining" of a railroad.⁷ In *Proprietors of Locks, etc. v. Lowell & Nashua Railroad Company*,⁸ Chief Justice Shaw repudiated the proposition, since approved in *Omaha v. Kramer*,⁹ that a diminution in the market value of land untouched by a public work is a special damage.¹⁰

13; *Mississippi*, iii. 17; *Missouri* (1875), ii. 21; *Montana*, iii. 14; *North Dakota*, i. 14; *South Dakota*, vi. 13; *Washington*, i. 16; *West Virginia* (1872), iii. 9; *Wyoming*, i. 33. Substantially the same provision in *Kentucky*, § 242; *Nebraska* (1875), i. 21; *Texas* (1872), iii. 9.

¹ *Miffin v. Railroad Co.*, 16 Pa. 182; *Elizabethtown & P. R. v. Helm*, 8 Bush, 681.

² See § 121.

³ The question whether a liability beyond the common law is imposed where damage is done to the remainder of a tract, part of which is taken, is considered in § 136, and must be dissociated from the present inquiry.

⁴ *Omaha v. Kramer*, 25 Neb. 489.

⁵ *Penny v. Southeastern R.*, 7 El. & B. 660; *Met. B'd of Works v. McCarthy*, L. R. 7 H. L. 243.

⁶ *Pennsylvania R. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. v. Marchant*, 119 Pa. 541; *Rigney v. Chicago*, 102 Ill. 64; *Gainesville, H. & W. R. v. Hall*, 78 Tex. 169; *Peel v. Atlanta*, 85 Ga. 138. See also *Columbia Delaware Bridge v. Geisse*, 35 N. J. L. 558; *Grand Rapids & I. R. v. Heisel*, 47 Mich. 393.

⁷ *Parker v. Boston & M. R.*, 3 Cush. 107.

⁸ 10 Cush. 385.

⁹ 25 Neb. 489.

¹⁰ See also *Gilbert v. Greeley, S. & P. R.*, 13 Col. 501.

The rule in *Omaha v. Kramer* is not acceptable. Although the legislature may declare an injury not known to the common law,¹ it should not be deemed to have done so by merely using the word "damage," or words of similar import. The promoters of works of public utility should not be subjected to a more onerous duty towards their neighbors than is imposed upon persons carrying on a private business, unless the legislative intention be most explicit. It has even been intimated that the full measure of common-law liability should not always be meted out to the promoters of public works. In *Metropolitan Board of Works v. McCarthy*,² Lord Chelmsford said, "A mere personal obstruction or inconvenience or a damage to a man's trade or the good-will of his business, although of such a nature that but for the act of Parliament it might have been the subject of an action for damages, will not entitle the party to compensation under it." It has been held that the injuries in question must be within the rule³ that, to obtain redress on account of damage from public works, one must show an injury to his property different from that sustained by the public.⁴

§ 155. Under all the constitutional and statutory provisions in question, a liability is imposed for all physical damage due to construction.⁵ Thus, the promoters of authorized works have been held responsible for casting water, earth, etc., upon land;⁶

¹ See § 158.

² L. R. 7 H. L. 243, 256.

³ See § 369.

⁴ *Gates v. Kansas City Bridge*, 111 Mo. 28.

⁵ *Proprietors of Locks, etc. v. Nashua & L. R.*, 10 Cush. 385; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161; *Reardon v. San Francisco*, 66 Cal. 492. In *Caledonian Railway Co. v. Walker's Trustees*, 7 App. Cas. 259, Lord Chancellor Selborne thus states the law: "When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. When damage arises, not out of the execution, but only out

of the subsequent use of the work, then also there is no case for compensation. Loss of trade or custom by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. The obstruction by the execution of the work of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation."

⁶ *East St. Louis & C. R. v. Eisen-trant*, 134 Ill. 96; *Fredericks v. Pennsylvania Canal*, 148 Pa. 317; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212. See also *Keates v. Holywell R.*, 28 L. T. N. S. 183; *Nicholson v. New York & N. H. R.*, 22 Conn. 73.

for interrupting drainage;¹ for diverting a spring, well, or water-course;² for using a brook as a sewer;³ and for removing a house, and thereby depriving an adjoining house of its gable end.⁴

Physical damage is not to be understood, necessarily, as damage to physical property. It covers a physical interference with an incorporeal right. Thus, one may have compensation for the destruction or impairment of access to his premises,⁵ and for the obstruction of access of light thereto.⁶

§ 156. In the English, and some of the American, legislation referred to,⁷ it is specified that the damage meant is that which results from the execution or construction of the undertaking. With this limitation in view, the courts have denied relief in a number of cases. Thus it has been held that railroad companies are not liable for damage caused by smoke, dust, noise, and odors,⁸ or by vibration.⁹

An injury may derive much of its weight from the operation of the undertaking, and yet be so closely connected with construction as to be fairly referred to it. Thus, where a railroad track was laid near the curb of a street, the running of trains was held to aggravate the impairment of access to

¹ *Pennsylvania S. V. R. v. Ziemer*, Townsend, 84 Ala. 478; *Hot Springs R. v. Williamson*, 45 Ark. 429; s. c.

² *Reading v. Althouse*, 93 Pa. 400; 136 U. S. 121; *Griffin v. Shreveport & Lycoming Gas Co. v. Moyer*, 99 Pa. 615; *United States v. Alexander*, 148 U. S. 186; *Parker v. Boston & M. R.*, 3 Cush. 107; *Trowbridge v. Brookline*, 144 Mass. 139.

³ *Washburn, etc. Man. Co. v. Worcester*, 153 Mass. 494.

⁴ *Snyder v. Lancaster*, 11 Atl. Rep. 872 (Pa. 1887).

⁵ *Chicago v. Taylor*, 125 U. S. 161; *Pennsylvania R. v. Duncan*, 111 Pa. 352; *County of Chester v. Brower*, 117 Pa. 647; *Pennsylvania S. V. R. v. Walsh*, 124 Pa. 544; *Butchers' Ice Co. v. Philadelphia*, 27 Atl. Rep. 376 (Pa. 1893); *Presbrey v. Old Colony R.*, 103 Mass. 1; *Bradley v. New York & N. H. R.*, 21 Conn. 294; *Rigney v. Chicago*, 102 Ill. 64; *Lake Erie & W. V. R. v. Scott*, 132 Ill. 429; *Montgomery v.*

⁶ *Eagle v. Charing Cross R.*, L. R.

2 C. P. 638; *Bradley v. New York & N. H. R.*, 21 Conn. 294. See also *Jones v. Erie & W. R.*, 151 Pa. 30; *London, T. & S. R. & Gower's Walk Schools*, L. R. 24 Q. B. D. 326.

⁷ See § 153.

⁸ *Pennsylvania R. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. v. Marchant*, 119 Pa. 541; *Jones v. Erie & W. V. R.*, 151 Pa. 30; *City of Glasgow R. v. Hunter*, L. R. 2 Sc. App. 78.

⁹ *Hammersmith & S. R. v. Brand*, L. R. 4 H. L. 171; *Penny v. South-eastern R.*, 7 El. & B. 660.

adjoining property caused, primarily, by the construction of the road.¹

§ 157. Where the governing law prescribes payment for damage, without specifying that it be due to construction, evidence may be given of damage due to operation, such as smoke,² vibration,³ and noise.⁴

Mindful of the rule that promoters of public works are not to be saddled with a heavier liability than is imposed by the common law,⁵ the courts have denied relief in certain cases, either because the injuries alleged are remote and speculative, or are personal losses or inconveniences rather than injuries to property.⁶ Thus, one cannot recover because the construction of an undertaking diverts custom from his place of business,⁷ nor because a fire-engine house is erected on adjoining land,⁸ nor for loss of privacy due to the opening of a street across an adjoining lot.⁹ In *Wallace v. Jefferson Gas Coal Company*,¹⁰ the plaintiff claimed compensation on account of the laying of a pipe for the conveyance of natural gas through his land three feet below the surface. It was urged that the market value of the land as coal land was diminished because, in mining, it would be necessary to leave a wide strip of coal for the support of the pipe, and, further, that there was danger of an escape of gas into the mine workings. As the average distance of the coal from the surface was nearly one hundred and fifty feet, and as the apprehension of injury was not justified by the evidence offered, the court treated the alleged injury as speculative and remote.

¹ *Pennsylvania S. V. R. v. Walsh*, 124 Pa. 544, distinguishing *Pennsylvania R. v. Lippincott*, 116 Pa. 472.

² *Omaha & N. P. R. v. Janecek*, 30 Neb. 276; *Gainesville, H. & W. R. v. Hall*, 78 Tex. 169. See also *Chicago & E. I. R. v. Loeb*, 118 Ill. 203; *Campbell v. Met. St. R.*, 82 Ga. 320.

³ *Gainesville, H. & W. R. v. Hall*, 78 Tex. 169. See also *Chicago & E. I. R. v. Loeb*, 118 Ill. 203.

⁴ *Gainesville, H. & W. R. v. Hall*, 78 Tex. 169.

⁵ See § 154.

⁶ *Hyde Park v. Dunham*, 85 Ill. 569; *Peoria & P. R. v. Peoria & F. R.*, 105 Ill. 110; *Campbell v. Met. St. R.*, 82 Ga. 320; *Morris v. Wisconsin Mid. R.*, 82 Wis. 541.

⁷ *Hohmann v. Chicago*, 140 Ill. 226.
⁸ *Van De Vere v. Kansas City*, 107 Mo. 83. See also *Rigney v. Chicago*, 102 Ill. 64.

⁹ *Peel v. Atlanta*, 85 Ga. 138.

¹⁰ 147 Pa. 205.

Peculiar Statutory Liability.

§ 158. In some instances the legislature has imposed a peculiar liability upon the promoters of public works. Thus, they may be held responsible for damage not actionable at common law.¹ Where a statute declared, that a railroad company, occupying a street, should be responsible for "injuries of every description" to property upon, or "near to," the street, it was held that property was "near," if injury to it was the direct and necessary result of the occupation of the street, and compensation was given for damage from smoke, noise, and sparks.² Under a statute which prescribed compensation for injuriously affecting any estate or interest in, to, or out of land, it was held that the compensation court were not bound to regard strict legal rights only, but could award compensation in respect to any claim which they considered reasonable and just.³ Where it was enacted that the projectors of a bridge and the owners of a ferry should choose referees to determine the damage, if any, which the latter might sustain by reason of the opening of the bridge, the prospective diversion of travel from ferry to bridge was declared a legal injury within the terms of the statute. The question whether the ferry was *property* within the constitutional meaning of the word was deemed immaterial, as the legislature had evidently treated it as such.⁴ Where any person who owns land adjacent to a highway may recover for "damage in his property," resulting from the improvement of the way, the town is liable for the escape of surface-water, though a private proprietor would not be.⁵

DAMAGE DONE DURING CONSTRUCTION.

§ 159. In the cases heretofore considered the injuries to property, whether transitory or permanent, are usually referable to a permanent cause, — the undertaking for which the public pow-

¹ *Monongahela Nav. Co. v. Coon*, 6 Pa. 379.

² *Railroad Co. v. Gardner*, 45 Ohio St. 309. See also *Shepherd v. Baltimore & O. R.*, 130 U. S. 426; *Grafton v. Baltimore & O. R.*, 21 Fed. Rep. 309.

³ *Plimmer v. Wellington*, 9 App. Cas. 699.

⁴ *Bookwalter v. Black Rock Bridge*, 38 Pa. 281.

⁵ *Woodbury v. Beverly*, 153 Mass. 245.

ers are exerted. Beside these injuries, are those due to a cause essentially transitory, — the constructing of works. If A's access to land is impaired by a railroad cutting, he is damaged by the *construction* of the work. If, in blasting rock to make the cutting, fragments are cast upon his land, he is damaged by the *constructing* of the work. Where a statute gave compensation to the owner of the fee of a street "over which rails of [a street railway] shall be laid," it was held that the act did not refer to rails in position, as these were not a burden on the fee, but to injuries due to the laying of the rails, such as piling earth on the sidewalk, and disturbing the grade.¹ But it has been held that a railroad corporation, having condemned land adjoining a street for a bridge approach, is entitled as an abutting owner to a reasonable use of the street during construction.² A statute, providing for compensation to one whose land is affected by the construction and maintenance of an aqueduct on adjacent land, is not to be construed in favor of one whose property is affected by smoke and noise caused by the operation of a steam-engine during the period of construction. The injuries in question are such only as may be caused by a completed work.³ It has been held that where a railroad corporation, authorized to occupy a street, is made responsible for injuries done thereby to property "lying upon, or near to," such street, it is not liable for a temporary interference with access due to the obstruction of the street during construction.⁴ But it has been recently decided in New York, that compensation may be recovered on account of depreciation in the rental value of abutting premises, due to the building of a railroad in the street.⁵ One in possession of property abutting on a street cannot recover for damage to his business caused by the obstruction of the street while it is being improved,⁶ or while a railroad is being built.⁷ Where an injury inflicted upon property in constructing works

¹ *Vose v. Newport R.*, 17 R. I. 134.

⁶ *Brooks v. Boston*, 19 Pick. 174;

² *Fitch v. New York, P. & B. R.*, 59 Conn. 414.

Stadler v. Milwaukee, 34 Wis. 98. See also *Treadwell v. Boston*, 123 Mass. 23.

³ *Squire's Petition*, 125 N. Y. 131.

⁷ *Ricket v. Metropolitan R.*, L. R. 2

⁴ *Shepherd v. Baltimore & O. R.*, 130 U. S. 426.

H. L. 175. But see *St. Louis, V. & T. H. R. v. Capps*, 72 Ill. 188.

⁵ *Williams v. Brooklyn El. R.*, 126 N. Y. 96.

is not physical it is without remedy, if the methods employed are proper.¹ Thus, it has been held that a corporation, using a pumping engine while sinking a shaft, is not liable on account of the noise.²

Where the effect of blasting, or other operation in the course of construction, is the casting of earth and stone upon other land the public agents are usually liable,³ unless they can place the responsibility upon their contractors.⁴ But it has been held that where blasting affects buildings by vibration the owners are without redress, provided due care has been used, because there is not a physical invasion of property.⁵

INTERFERENCES WITH PROPERTY SUBSEQUENT TO THE ORIGINAL TAKING.

§ 160. Where land acquired to further a certain public undertaking is required, in whole or in part, for another undertaking, important questions arise as to the existence and extent of liability on the part of the promoters of the new undertaking to the promoters of the old one, and to the owner of the fee. It is important, also, to determine how far changes and improvements in existing undertakings operate to enlarge the interest already acquired, and thus effect a new taking of property from the owner of the fee.

§ 161. Where one corporation attempts to use property in possession of another, these questions may arise. Is the property such as can be used without express authority?⁶ Has such authority been given?⁷ Is a franchise affected?⁸ The present question is,—Is there a taking of ordinary property? So much of the law of this subject is necessarily considered in the pages referred to, that a brief answer will suffice. The rule is, that

¹ See *Fenwick v. East London R.*, *Peter v. Denison*, 58 N. Y. 416. See L. R. 20 Eq. 544.

² *Harrison v. Southwark & V. Water Co.* (1891), 2 Ch. 409.

³ *Dodge v. County Comm.*, 3 Met. 380; *Brown v. Providence, W. & B. R.*,

5 Gray, 35; *Sabin v. Vermont Cent. R.*, 25 Vt. 363; *Carman v. Steubenville & I. R.*, 4 Ohio St. 399. See also *St.*

⁴ *Tibbetts v. Knox & L. R.*, 62 Me. 437.

⁵ *Booth v. Rome, W. & O. R.*, 140 N. Y. 267.

⁶ See §§ 97, 98.

⁷ See §§ 177-180.

⁸ See §§ 165-168.

such property is taken, unless the prior corporation has acquired it subject to the right of the state to freely permit its use by the second corporation. Thus, it has been held that where a telegraph company erect their plant along the right of way of a railroad company, there is a partial appropriation of the latter's property.¹ Under a general authority to condemn land for a way, it is usually held that the way may be laid across another at any section of the latter devoted simply to the passing use,² subject, however, to such reasonable conditions as may be imposed in the interests of the safety and utility of both ways.³ It has been held, that where authority is granted to condemn for a way, the right is reserved to permit its intersection by another way, in the manner mentioned, without compensation.⁴ But a different rule is declared in other decisions. Thus the crossing of a railroad by a highway has been held a taking of the company's property.⁵ It is usually held that there is a taking of property when a railroad is laid across a railroad,⁶ a turnpike,⁷ a canal.⁸

§ 162. **Imposition of an Additional Burden on the Fee.** — It may happen that land subjected to a public easement, is afterwards subjected to a second public use, and that both uses are maintained. Putting aside all controversies in respect to authority,⁹ and liability, which may arise between the corporations, the question is whether the second corporation must pay compensation to the owner of the fee. Most of the cases under this head

¹ *Atlantic & P. Tel. Co. v. Chicago*, Grand Rapids & I. R., 35 Mich. 267; R. I. & P. R., 6 Biss. 158.

² See § 129.

³ See §§ 15, 278.

⁴ *Albany, North. R. v. Brownell*, 24 N. Y. 345. See also *Boston, H. & W. R.*, 79 N. Y. 64.

⁵ *Old Colony & F. R. R. v. County of Plymouth*, 14 Gray, 155; *New York & N. E. R. v. Waterbury*, 60 Conn. 1; *Illinois Cent. R. v. Chicago*, 138 Ill. 453, *Illinois Cent. R. v. Chicago*, 141 Ill. 586.

⁶ *Massachusetts Cent. R. v. Boston*, 43 N. J. L. 528; *Tuckahoe Canal v. C. & F. R.*, 121 Mass. 124; *Nat'l Docks R. v. United Companies*, 53 N. J. L. 217; *Grand Rapids, N. & L. L. R. v.*

Flint & P. M. R. v. Detroit & B. C. R., 64 Mich. 350; *Lake Shore & M. S. R. v. Cincinnati, S. & C. R.*, 30 Ohio St. 604; *Chicago & W. I. R. v. Englewood R.*, 115 Ill. 375; *Cincinnati South. R. v. Chattanooga Electric R.*, 44 Fed. R. 470. See *St. Louis, I. M. & S. R. v. Peach Orchard & G. R.*, 42 Ark. 249. ⁷ *Seneca Road Co. v. Auburn & R. R.*, 5 Hill, 170; *Indianapolis, etc. Road Co. v. Belt R.*, 110 Ind. 5.

⁸ *Lehigh Val. R. v. Dover & R. R.*,

Tuckahoe R., 11 Leigh, 42.

⁹ See §§ 97, 177.

are considered in the chapter on the use of streets. Now whatever be the interest remaining in the owner of the fee of land subjected to a highway easement,¹ it is generally true that in other cases the imposition of a public easement upon land, other than that for which it was condemned or purchased, is an additional burden on the fee, and must be viewed as a second appropriation of property to public use. Thus where land is subjected to a railroad easement, a telegraph company cannot erect their plant along the right of way without compensation to the owner of the fee.² The owner of land, in which an easement for a canal has been acquired, is entitled to compensation from a railroad company laying their tracks along the canal bank.³

If, instead of two undertakings subsisting together, a new undertaking replaces the original one, is there a new taking of property? Where the imposition of the new undertaking effects the abandonment, in law, of the use for which the land was originally acquired,⁴ the owner of the fee is repossessed of his whole estate, and may obtain full compensation on account of the new use. If there is no abandonment, because the original use is subserved in a manner substantially similar to that first adopted, there is not a new taking. Thus, a highway may be changed into a turnpike without additional compensation to the owner of the fee.⁵ In this case the way remains substantially the same, and the payment of toll to a corporation, which is bound to keep the road in repair, is not deemed to be an additional burden upon the abutter, since he is relieved from the taxes formerly assessed for the maintenance of the highway. Compensation is not due where an alley is made a street,⁶ or a toll-bridge substituted for a ferry.⁷

If there is still no abandonment, but the new undertaking, while subserving the same general purpose as the former, re-

¹ See §§ 412-416.

² *American Tel. Co. v. Pearce*, 71 Md. 535. See also *Southwestern R. v. Turnpike*, 22 Md. 219. But see *Cape South. & A. Tel. Co.*, 46 Ga. 43.

³ *Lafayette, M. & B. R. v. Murdock*, 68 Ind. 137.

⁴ See § 220.

⁵ *Walker v. Caywood*, 31 N. Y. 51; *Wright v. Carter*, 27 N. J. L. 76; *Chag-*

rin Falls, etc. Co. v. Cane, 2 Ohio St.

419; *Douglass v. Boonsborough, etc.*

Girardeau, etc. Co. v. Renfro, 58 Mo.

265.

⁶ *Fagan v. Chicago*, 84 Ill. 227.

⁷ *Hudson v. Cuero, L. & E. Co.*, 47

Tex. 56.

quires a larger or different use of the land, there is an additional servitude imposed upon the fee.¹ Thus a railroad, laid upon a turnpike, imposes an additional servitude.²

§ 163. *Damage from Alteration of Works.* — Where a corporation has condemned an interest in a tract of land, it has paid for the right to do all things necessary for the lawful construction and maintenance of the undertaking, and is under no further liability to the owner. The compensation is conclusively presumed to cover all damage due to such construction and maintenance.³

Alterations in the construction of works are often expedient. These alterations may be made without further compensation to the owner of the fee, if they can be fairly brought within the scope of the undertaking for which the land was condemned. It has been held that the owner cannot recover for the shifting of a railroad track to another location within the right of way,⁴ nor for the laying of an additional track.⁵ Even though the alterations in question are so radical as to cause appreciable injury, they may be freely made. Thus a water company, authorized to draw water from a pond, may substitute a large pipe for the small one first laid without compensation, for, as they had the right to take all the water at the time of the original diversion, they are presumed to have paid for it.⁶ The rule has also been applied where a corporation substitutes a trestle bridge for an embankment, with the result that land is flooded.⁷

¹ *Hatch v. Cincinnati & I. R.*, 18 Ohio St. 92. See *Wellington's Petition*, 16 Pick. 87.

² *Mifflin v. Harrisburg, P. etc. R.*, 16 Pa. 182. See *Brainard v. Missisquoi R.*, 48 Vt. 107.

³ *Brady v. Fall River*, 121 Mass. 262; *Trenton Water Power v. Chambers*, 13 N. J. Eq., 199; *Van Schoick v. Delaware & R. Canal*, 20 N. J. L. 249; *Aldrich v. Cheshire R.*, 21 N. H. 359; *New Orleans, B. R., etc. R. v. Brown*, 64 Miss. 479. See *Waterman v. Connecticut & P. R. R.*, 30 Vt. 610; *Watson v. Van Meter*, 43 Iowa, 76. See § 129.

⁴ *Hentz v. Long Island R.*, 13 Barb. 646. See also *Snyder v. Pennsylvania R.*, 55 Pa. 340; *Commonwealth v. Haverhill*, 7 Allen, 523.

⁵ *White v. Chicago, S. & P. R.*, 122 Ind. 317. See *Davis v. Chicago & N. W. R.*, 46 Iowa, 389.

⁶ See *Smith v. Concord*, 143 Mass. 253; *Stone v. Yeoville*, 2 C. P. D. 99.

⁷ *Moss v. St. Louis, I. M. & S. R.*, 85 Mo. 86. See also *Bell v. Norfolk Southern R.*, 101 N. C. 21; *Barnes v. Michigan Air Line R.*, 65 Mich. 251; *Hodge v. Lehigh Val. R.*, 39 Fed. Rep. 449.

Where land has been condemned for a work which does not require the exclusive possession of the soil for its maintenance, entry may be made when necessary for inspection and repair, without further compensation. Thus, a road board may freely enter upon land impressed with a drainage servitude, for the purpose of clearing out a drain.¹

§ 164. The rule does not apply where the injury could not be presumed to result from the construction and operation of the undertaking, and therefore was not taken into account in assessing compensation. It does not apply when the injury is due to the execution of the works on other land.² Thus, one who has received compensation for all injuries due to the construction of a canal across his land, may yet recover for damage by flooding, due to the construction of an embankment on other land.³ Nor does the rule apply to damage resulting from negligent or improper construction.⁴

When compensation is based on a specified plan of construction,⁵ damage caused by an alteration must be paid for.⁶ Thus, when a railroad company condemned a way through a farm, and proposed to build a bridge which would not interfere with intercommunication, the compensation awarded was held inadequate when the company changed the plan and built an embankment.⁷ The expropriators are liable for injuries caused by alterations made in furtherance of a larger use than the one originally contemplated,⁸ as, for example, raising a dam and thereby flooding a larger area,⁹ or making a private road public.¹⁰

¹ See *Ward v. Peck*, 49 N. J. L. 42; 519; *Gordon v. Pennsylvania R.*, 6 Chronic v. Pugh, 136 Ill. 539. W. N. C. (Pa.) 405.

² See *Eaton v. B. & M. R.*, 51 N. H. 504; *St. Louis, I. M. & S. R. v. Harris*, N. J. Eq. 249.

³ *Lancashire & Y. R. v. Evans*, 15 47 Ark. 340.

⁴ *Delaware & R. Canal v. Lee*, 22 Beav. 322. N. J. L. 243.

⁵ *Union Canal v. Stump*, 81½ Pa. 355. See *Colwell v. Mays Landing, etc.* 130; *Ohio & M. R. v. Thillman*, 143 Ill. Co., 19 N. J. Eq. 245.

⁶ *Ayres v. Richards*, 41 Mich. 680.

⁷ See also *Speir v. New Utrecht*, 121 N. Y.

⁸ See § 327. *Illinois & S. L. R. v. Switzer*, 117 420; *Green v. Bethes*, 30 Ga. 896; Ill. 399; *Snow v. Provincetown*, 109 Woodbridge v. Eastland County, 70 Mass. 123; *Lane v. Boston*, 125 Mass. Tex. 680.

THE AFFECTING OF CONTRACTS BY THE EMINENT DOMAIN.

Franchises.

§ 165. Where legislation affects a corporate franchise the first question to be determined is whether the accomplishment of this result is within what is called the reserved power of the state over its corporations, a power which includes the right to impair franchises without making compensation. If such legislation is a valid expression of the police power it is within the reserved power, for it has been shown that the state cannot part with its power of police.¹ But the police power cannot be used colorably, in order to destroy vested rights without compensation.² Hence, where a city, by extending its boundaries, embraces a section of a turnpike, it cannot be authorized to remove the toll-gates without compensation. This is not a regulation of property by the police power, but a taking of a franchise to collect tolls.³

Power to amend, alter, or repeal corporate charters or franchises is expressly reserved in the Constitutions of certain States, and in many acts of incorporation in others. The effect of the reservation is that the state may alter or destroy whatever may be defined as a corporate franchise, without paying compensation to its possessors.⁴ But, assuming the existence of a reserved power, the intention to exert it must plainly appear. This intention is disclosed, where one railroad corporation is expressly authorized to use the tracks of another.⁵ The intention to affect an existing franchise is not disclosed by the mere authorization of a new undertaking, the accomplishment of which might effect this result, for one corporation cannot impair the franchise of another without special authority.

The reserved right to divest franchises without compensation

¹ See § 100.

Gardner, 20 Upp. Can. C. P. 107. See

² Commonwealth v. Essex Co., 13 Gray, 239. See § 23.

Snell v. Chicago, 133 Ill. 413.

⁴ Greenwood v. Freight Co., 105

³ Detroit v. Detroit, etc. Plank Road, U. S. 13.

43 Mich. 140; Ft. Wayne Land, etc.

⁵ Metropolitan R. v. Highland R.,

Co. v. Maumee Ave., 132 Ind. 80. See 118 Mass. 290.

also Atty.-Gen. v. Germantown Turnpike, 55 Pa. 466; St. Catharines v.

does not enable the state to so divest property acquired under the franchises.¹ Thus, although a railroad corporation with repealable franchises may be compelled to share its track with another corporation, without indemnity for interruption of business, loss of profits, or other injury to franchises, it may obtain compensation for the use of its roadway, and other property.²

In the absence of a constitutional or statutory reservation, the governing law is that laid down in *Dartmouth College v. Woodward*.³ A corporate charter or franchise is a contract between the state and its grantees, and is within the protection of the Fifth Amendment. The contract is property,⁴ and can be divested only by the power always reserved,⁵ the right of eminent domain.

Franchises may be affected in at least three ways. They may be incidentally impaired by the condemnation of land necessary to their enjoyment, intentionally impaired by the construction of a competing work, or wholly resumed or destroyed.

§ 166. **Incidental taking of Franchises.** — Where property necessary to the enjoyment of a franchise is condemned, the franchise is taken in whole or in part, as the case may be. But a corporation may hold land, the condemnation of which will not impair its franchises.⁶ Thus, where a railroad corporation laid its track across the basin of a water-power company, it was held that the franchise of the latter was in nowise affected.⁷ The planting of telegraph poles along the exterior lines of a turnpike does not necessarily impair the franchise of the company owning the pike.⁸

A test which may be often applied to determine whether a franchise is impaired by the taking of land, is whether the land

¹ *Sinking Fund Cases*, 99 U. S. 700; *Greenwood v. Freight Co.*, 105 U. S. 13; *People v. O'Brien*, 111 N. Y. 1.

² *Metropolitan R. v. Highland R.*, 118 Mass. 290. See *Jersey City & B. R. v. Jersey City & H. R.*, 20 N. J. Eq. 61; *a. c.* 21 N. J. Eq. 550; *North Baltimore R. v. North Ave. R.*, 75 Md. 233; *Pacific R. v. Wade*, 91 Cal. 449.

⁴ *Wheat*, 518.

⁵ See § 82.

⁶ See § 100.

⁷ *New York, H. & N. R. v. Boston, H. & E. R.*, 36 Conn. 196; *New York & L. B. R. v. Drummond*, 46 N. J. L. 644; *Moses v. Sanford*, 11 Lea, 731; *North Carolina Cent. R. v. Carolina Cent. R.*, 83 N. C. 489.

⁸ *Boston Water Power Co. v. Boston & W. R.*, 23 Pick. 360.

⁹ *State v. American, etc. News Co.*, 43 N. J. L. 381.

itself is within the purview of the rule forbidding the condemnation of property already devoted to public use, without express authority.¹ If the land is so protected, a franchise is frequently connected with it.

§ 167. **Taking by Competition.** — Where an undertaking is operated under a franchise which is not exclusive, the legislature may authorize a competing undertaking without providing for compensation.² But where a corporation enjoys an exclusive franchise, that is, a monopoly of a certain business within certain limits,³ and another corporation is empowered to carry on a like business within the limits, the franchise is impaired by competition.⁴

In some cases the courts have found no competition in fact, and consequently none in law.⁵ Thus, an exclusive franchise to carry passengers between two points is not impaired by an undertaking for the carriage of freight.⁶ A street-car line, operated on a street already devoted to the use of a corporation running cars in an opposite direction, does not compete with the latter.⁷

Further, an undertaking may compete in fact with one operated under an exclusive franchise, and yet not compete in law.⁸ For example, where the grant of an exclusive franchise contemplates a particular mode of attaining its purpose, the authorization of different means directed to the same end does not necessarily impair the contract. Hence, if one has been given the exclusive right to ferry passengers, he cannot complain unless a rival ferry

¹ See §§ 97, 98.

² *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Turnpike Co. v. State*, 3 Wall. 210; *Hamilton Ave.*, 14 Barb. 405; *Ft. Plain Bridge v. Smith*, 30 N. Y. 44; *Lafayette Plankroad v. New Albany R.*, 13 Ind. 90. See also *Mississippi River Bridge v. Lonergan*, 91 Ill. 508; *Bordentown, etc. Turnpike v. Camden & A. R.*, 17 N. J. L. 314.

³ See § 83.

⁴ *Binghampton Bridge Co.*, 3 Wall. 51; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Aikin v. Western R.*, 20 N. Y. 370; *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398; *Boston & L. R. v. Salem & L. R.*, 2 Gray, 1; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35. See also *Raritan & D. B. R. v. Delaware & R. Canal*, 18 N. J. Eq. 546; *Mason v. Harpers Ferry Bridge*, 17 W. Va. 396; *Met. City R. v. Chicago W. D. R.*, 87 Ill. 317.

⁵ See *Street R. v. West Side St. R.*, 48 Mich. 433.

⁶ *Richmond, F. & P. R. v. Louisa R.*, 13 How. 71.

⁷ *Philadelphia & G. F. R. Appeal*, 102 Pa. 123.

⁸ See *New York & N. E. Transfer Co.*, 14 Blatch. 159.

is established, though his custom is diverted by reason of the erection of a bridge.¹ So, an exclusive franchise to maintain a bridge for the use of foot passengers and wagons, is not impaired by the construction of a railroad bridge.² In *Hartford Bridge Company v. Union Ferry Company*,³ the plaintiffs had been granted a franchise, a part of the contract being that existing ferries between Hartford and East Hartford were to be discontinued, and that the towns were never to transport passengers across the river. The defendants were subsequently chartered to operate a ferry, which diverted travel from the bridge to some extent. It was held that the bridge franchise was not impaired, because the terms of the contract did not cover the ferry in question.

§ 168. *Direct taking of Franchise.* — A franchise is directly impaired when its possessors are obliged to permit a new corporation of like character to use the property necessary to its enjoyment. Thus, the use of railroad tracks by a new corporation, duly authorized, may impair the original franchise to operate the road.⁴

A franchise may be wholly resumed or destroyed by the state. Legislation directed to such an end may spring from the desire to throw open to the public an undertaking operated under an exclusive franchise. Thus a franchise is destroyed when a toll-bridge is made free,⁵ a highway substituted for a turnpike,⁶ and where tolls imposed on navigation are abolished.⁷

¹ *Perott v. Lawrence*, 2 Dill. C. C. 332; *Kansas & A. R. v. Payne*, 4 U. S. App. 77. See also *Columbia Delaware Bridge v. Geisse*, 35 N. J. L. 558; *Hopkins v. Great North. R.*, 2 Q. B. D. 224. But see *Queen v. Cambrian R. L. R.*, 6 Q. B. 422.

² *Bridge Proprietors v. Hoboken L. & I. Co.*, 1 Wall. 116, affirming s. c., 13 N. J. Eq. 503. See also *Mohawk Bridge v. Utica & S. R.*, 6 Paige, 554; *McRee v. Wilmington & R. R.*, 2 Jones L. 186. Compare *Enfield Toll Bridge v. Hartford & N. H. R.*, 17 Conn. 40.

³ 29 Conn. 210.

⁴ *Pennsylvania R. v. Baltimore & O. R.*, 60 Md. 263. See also *Citizens' Coach Co. v. Camden Horse R.*, 33 N. J. Eq. 267; *Alexandria & F. R. v. Alexandria & W. R.*, 75 Va. 780; *Canal & C. R. v. Crescent City R.*, 41 La. An. 561. See *Metropolitan R. v. Highland R.*, 118 Mass. 290.

⁵ *West River Bridge v. Dix*, 6 How. 507; *Towanda Bridge*, 91 Pa. 216; *Central Bridge v. Lowell*, 4 Gray, 474.

⁶ *Philadelphia, N. & N. Y. R. Appeal*, 120 Pa. 90.

⁷ *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

Private Contracts.

§ 169. A private contract is property, and may be taken by the eminent domain.¹ The effect of the power is usually indirect, resulting from the condemnation of the property which is the subject of the contract. It will appear, that the action of the eminent domain upon such property does not abrogate, as a rule, the contractual relation. Nor does it enable one of the parties to compel an alteration in the terms of the contract, in order that the original object may be attained. Thus, where one grants a right of way over a tract of land for a pipe, and the way is afterwards subjected to a highway easement, the grantee has no right to lay the pipe in another part of the tract.²

Covenants of warranty, and others of like character, are supposed to be made in submission to the right of eminent domain. Therefore, if, after conveyance, the land is condemned the covenants are terminated. There is not a breach for which compensation can be claimed, or suit maintained against the covenantor.³

The courts of the several States are not in full accord on the question, whether the existence of a public interest in land conveyed is a breach of a covenant against encumbrances. Some decisions declare the comprehensive rule, that the subjection of the land to any foreign interest, latent or patent, known or unknown to the vendee, constitutes a breach.⁴ Other decisions, while not perhaps supporting so broad a proposition, hold that the existence of a public way over the land is within the covenant.⁵ But the mere staking out of a road over the land does not encumber it, where acceptance of the road by the authorities is necessary to its existence.⁶ In other cases, it is held that

¹ See § 84.

² *Johnson v. Jaqui*, 27 N. J. Eq. 552.

³ *Smith v. Hughes*, 50 Wis. 620; *Ellis v. Welch*, 6 Mass. 246; *Stevenson v. Loehr*, 57 Ill. 509. See also *Legal Tender Cases*, 12 Wall. 457, 549; *Cooper v. Bloodgood*, 32 N. J. Eq. 269. See *Brimmer v. Boston*, 102 Mass. 19; *Ake v. Mason*, 101 Pa. 17.

⁴ *Burk v. Hill*, 48 Ind. 52; *Quick v. Taylor*, 113 Ind. 540; *Kellogg v. Malin*,

50 Mo. 496; s. c. 62 Mo. 429. See also *Forster v. Scott*, 136 N. Y. 577.

⁵ *Kellogg v. Ingersoll*, 2 Mass. 97; *Hubbard v. Norton*, 10 Conn. 422; *Al-ling v. Burlock*, 46 Conn. 504; *Pritchard v. Atkinson*, 3 N. H. 335; *Beach v. Miller*, 51 Ill. 206, *Wadhams v. Swan*, 109 Ill. 46; *Herrick v. Moore*, 19 Me. 313. See *Cincinnati v. Brachman*, 35 Ohio St. 289.

⁶ *Shute v. Barnes*, 2 Allen, 598.

where the public occupation is patent there is not a breach of the covenant, as the presumed knowledge of the vendee is equivalent to acquiescence,¹ but that the covenant is broken if the existence of the public right is not apparent.²

§ 170. Where the fee simple of an entire tract, subject to a lease, is condemned, the relation of lessor and lessee is terminated,³ and is not revived by reconveyance to the lessor.⁴ There is some difference of opinion as to the effect of condemnation upon a lease, where the legal title to the premises remains in the lessor. It is usually held, that there is not an eviction, but that the covenant to pay rent is unaffected, whether the whole or a part of the tract is taken,⁵ unless indeed the lessee has a statutory right to abandon the premises upon their condemnation.⁶ In other decisions condemnation is held to abrogate the lease in whole or in part, as the case may be.⁷

Where land is condemned after the owner has agreed to sell it, the contract is not abrogated.⁸ It has been held that a condemnation of land is a sale of it, within the meaning of a contract by which one agrees to make a certain distribution of the purchase price in case the land is sold. The compensation is the purchase price, and is to be distributed as agreed upon.⁹

It may be noted here that, while a municipal lien for unpaid taxes is extinguished by the condemnation of the land by the state, the personal liability of the owner is not affected.¹⁰

¹ *Peterson v. Arthurs*, 9 Watts, 152; *Smith v. Hughes*, 50 Wis. 620; *Jordan v. Eve*, 31 Gratt. 1; *Whitbeck v. Cook*, 15 Johns. 483; *Haldane v. Sweet*, 55 Mich. 196; *Desvergers v. Willis*, 56 Ga. 515. See also *Butt v. Riffe*, 78 Ky. 352; *Wilson v. Cochran*, 46 Pa. 229.

² *Hymes v. Esty*, 116 N. Y. 501; s. c. 133 N. Y. 342; *Trice v. Kayton*, 84 Va. 217. See *Huyck v. Andrews*, 113 N. Y. 81; *Peck v. Jones*, 70 Pa. 83.

³ *O'Brien v. Ball*, 119 Mass. 28; *Corrigan v. Chicago*, 144 Ill. 537. See also *William and Anthony Streets*, 19 Wend. 678; *Barclay v. Pickles*, 38 Mo. 143.

⁴ *O'Brien v. Ball*, 119 Mass. 28.

⁵ *Ellis v. Welch*, 6 Mass. 246; *Parks v. Boston*, 15 Pick. 198; *Folts v. Huntley*, 7 Wend. 210; *Dyer v. Wightman*, 66 Pa. 425; *Stubbings v. Evanston*, 136 Ill. 37; *Foot v. Cincinnati*, 11 Ohio, 409. See also *Workman v. Mifflin*, 30 Pa. 362; *Gallup v. Albany R.*, 65 N. Y. 1; *Emmes v. Feeley*, 132 Mass. 347.

⁶ See *Phyfe v. Eimer*, 45 N. Y. 102.

⁷ *Biddle v. Hussman*, 23 Mo. 597; *Levee Commissioners v. Johnson*, 66 Miss. 248.

⁸ See § 306.

⁹ *Vandermulen v. Vandermulen*, 108 N. Y. 195.

¹⁰ *Richardson v. Boston*, 148 Mass. 508.

CHAPTER VIII.

LOCATION AND ITS INCIDENTS.

§ 171. It has been shown in the preceding chapter that property may be taken, in point of law, without being actually reduced to useful possession. The location of an undertaking is the definite selection and appropriation of property needed, — the act by which expropriators assert the right to use certain property, usually a tract of land.

In a transfer of land between private persons the vendor is an active party, as he delivers a deed to the vendee. The Lands Clauses Act approves this method to some extent, by requiring the owner of land taken to make a formal conveyance of it to the promoters for the consideration of the assessed compensation, in default of which the promoters shall acquire title by executing a deed poll.¹ In the United States condemnation is sharply distinguished from an ordinary sale in this respect, — a deed is rarely regarded as necessary to the condemnation of land for public use. The statutory proceedings are a sufficient record of the transfer.²

CHOICE OF SITE.

Statutory Location.

§ 172. The legislature sometimes enacts that specific property shall be taken for the public use.³ In this fashion land has been set apart for a street,⁴ and a park.⁵ In the cases cited the actor

¹ Sec. 75.

² *Indianapolis & S. L. R. v. Smythe*, 45 Ind. 322; *Carpenter v. State*, 12 Ohio St. 457. See *East Tennessee & V. R. v. Love*, 3 Head 63.

³ *Union Ferry Co.*, 98 N. Y. 139; *Baltimore & O. R. v. Pittsburgh, W. &*

K. R., 17 W. Va. 812. See also *Boom Co. v. Patterson*, 98 U. S. 403; *Suburban, etc. R. v. New York*, 128 N. Y. 510.

⁴ *Spears v. New York*, 87 N. Y. 359; *Smedley v. Irwin*, 51 Pa. 445.

⁵ *Dep't. of Public Parks*, 53 Hun, 280.

is either the state itself, or one of its political corporations, but there seems no reason to doubt but that this power of legislative selection may be exercised for a private corporation, especially where it is compelled to condemn property in order to perform its public obligations.¹

Discretionary Location.

§ 173. Where the necessity for a public work exists, it has been shown that the expropriators may be invested with a certain discretion in the choice of its site.² The impracticability of an exact designation by the state often necessitates this course. The fact that the property of one person is not more highly esteemed than that of another as often justifies it. This discretion is rarely unlimited. It may be qualified by statutory limitations, or by restrictions based on public policy.

A common restraint on location is that a state, or a political corporation, shall not condemn property beyond its territorial jurisdiction. The restraint is imperative in the case of the state,³ but the necessities of a political corporation may warrant the condemnation of property beyond its borders.⁴ Thus a city may be authorized to condemn such property for a water supply,⁵ a sewer,⁶ and for a park,⁷ if it be near enough to be available to the community.⁸

§ 174. **Statutory Restrictions.** — The legislature may impose a general restraint upon the selection of property, by designating territorial limitations beyond which the right to condemn shall be inoperative. Thus, where a railroad company is incorporated under a special act, the route must conform to the prescribed terminals and intermediate points. But route requirements are to be liberally construed.⁹ Thus, although the boundary between

¹ See § 105.

² See § 103.

³ See § 28.

⁴ See *Houghton v. Huron Min. Co.*, 57 Mich. 547.

⁵ *Slingerland v. Newark*, 54 N. J. L. 62; *Warner v. Gunnison*, 31 Pac. R. 238 (Col. 1892). See also *New York v. Bailey*, 2 Denio, 433.

⁶ *Maywood County v. Maywood*, 140 Ill. 216. See *Coldwater v. Tucker*, 36 Mich. 474. See § 401.

⁷ *County Court v. Griswold*, 58 Mo. 175; *Thompson v. Moran*, 44 Mich. 602. See also *Matter of Buffalo*, 139 N. Y. 422.

⁸ *Matter of New York*, 99 N. Y. 569.

⁹ *Purifoy v. Richmond & D. R.*, 108

States divided by a river is the thread of the stream, an authorization to build a railroad west from the "westerly boundary of Iowa," was held to permit construction from the Iowa bank of the Missouri River.¹ Where a railroad was to be built from a point on a certain railroad "at or near Parkersburg," the selection of a point a mile and a half from the town was held to conform to the legislative scheme, which was to afford a connection with the railroad.² Where authority is given to build a railroad from, to, or at a town, or between towns, it is usually construed to permit location within the town, not merely at its boundary.³ It has been held that an authorization to build a railroad through A, B, and C is complied with by building from A to C through a corner of B, and then back to B.⁴ Where a route is specifically designated it must be entirely followed. A partial compliance will vitiate the whole location.⁵

The legislature may impose a more precise restriction on the property to be condemned. Where a city authorizes a railroad company to condemn a right of way "adjacent" to an alley, the alley itself cannot be encroached upon.⁶ An aqueduct company, authorized to take springs and waters connected therewith, cannot condemn the waters of a pond.⁷ A corporation, authorized to flood land by means of a dam to be erected at a certain point on a river, cannot plead the statute in bar of an action of trespass for flooding caused by a dam built five miles below the point in question.⁸

§ 175. Although before the eminent domain all property stands on the same plane, the legislature sometimes recognizes the fact that an unrestrained freedom of selection may result in needless hardship to a property owner, as, for example, the

N. C. 100. See also *Morris & Essex R. v. Hudson Tunnel Co.*, 38 N. J. L. 548.

¹ *Union Pacific R. v. Hall*, 91 U. S. 343. See also *Mohawk Bridge v. Utica & S. R.*, 6 Paige, 554.

² *Parke's Appeal*, 64 Pa. 137.

³ *Mohawk Bridge v. Utica & S. R.*, 6 Paige, 554; *People v. Thompson*, 67 How. Pr. 491; *Hazlehurst v. Freeman*, 52 Ga. 244. See also *Western Pa. R. Appeal*, 99 Pa. 155; *People v. Brooklyn, F. & C. I. R.*, 89 N. Y. 75.

⁴ *Commonwealth v. Fitchburg R.*, 8 Cush. 240.

⁵ *Metropolitan Transit Co.*, 111 N. Y. 588.

⁶ *Tudor v. Chicago & S. S. R.*, 27 N. E. Rep. 915 (Ill. 1891).

⁷ *Proprietors of Mills, etc. v. Braintree Water Supply Co.*, 149 Mass. 478.

⁸ *Davis v. Log Driving Co.*, 82 Me. 346.

destruction of a house to further a use which can be as well subserved by the occupation of unimproved land. Statutory exemptions of dwellings, etc.,¹ are the most notable examples of such legislation. Further, there is sometimes accorded to the landowner the right to question the selection of his property.² Where it is enacted, that public works must be so located as to obtain the greatest public benefit with the least private injury,³ mere proof that an undertaking might be equally well located elsewhere will not discredit the location chosen.⁴ The General Railroad Act of New York permits a landowner to file objections to a proposed location.⁵ The objections are to be considered by commissioners, one of whom shall be an engineer. With the concurrence of the latter the route may be altered, provided such alteration will not cause greater damage to property, materially lengthen the road, or substantially change its general route. Such legislation is to be commended, for it in nowise interferes with the reasonable exercise of the right of eminent domain, and yet contemplates the possibility of its abuse.

§ 176. **Restrictions other than Statutory.** — Beyond specific statutory limitations on the power of selecting property for condemnation, there are restrictions, more or less well defined, based usually on public policy. The most notable of these is expressed in the rule that property already devoted to public use shall not be occupied to the total or partial derogation of such use, unless the right to do so shall be given expressly, or by necessary implication.⁶ It has been said that property impressed with a public use cannot be taken for the same use.⁷ This statement did not affect the decision, for the court found that two railroads running to different points were sufficiently dissimilar to warrant one to condemn a right of way over part of the route of the other. Read with the broad definition of dissimilarity upon which the decision is based, the statement sufficiently describes, perhaps, the actual limitations of the power to

¹ See § 95.

² *Minneapolis Ry. Terminal Co.*, 38 Minn. 157.

³ *California Code Civ. Proc.*, § 1242.

⁴ *Cal. Cent. R. v. Hooper*, 76 Cal 404; *Pasadena v. Stimson*, 91 Cal. 238.

⁵ Sect. 22.

⁶ See §§ 176-180.

⁷ *Lake Shore & M. S. R. v. Chicago & W. I. R.*, 97 Ill. 506.

condemn property already in public use. But the statement is not correct in theory. The right of eminent domain must be so broadly defined, that if it be to the public good that a public use be administered by different agents, the state may effect the substitution by buying out the agents in charge. The substitution of a free bridge for a toll-bridge¹ is nearly in point. Not quite, however, as there is a substantial difference between a free way and a toll-way. Should the government decide to acquire the telegraph lines, it could do so only by compensating the owners. It would thus condemn property, in order to continue a public use under a new management.

§ 177. The authority to take specific property already in public use need not be express. It is sufficient if the statute discloses the legislative intention. Thus, where a railroad corporation is authorized to extend its line to a union depot, and the proper route is over other railroad property, authority to condemn will be inferred.² Where a city is empowered to appropriate all the wharf property within its limits, wharves held for railroad purposes are included.³

Although a corporation is empowered to take "property however occupied," the clause will not be construed so as to include streets, or other public property.⁴ A similar restriction has been placed upon the power to take property "near and convenient."⁵

Authority to take land already in public use will not be inferred from the fact that such action would be economical.⁶ Thus, water rights, owned by a water company, cannot be condemned by another water company on the plea that the necessities of the latter are the greater, and that the acquisition of the property in question would save much of the expense which would attend the acquisition of water rights elsewhere.⁷

¹ See § 168.

² *Providence & W. R. v. Norwich & W. R.*, 138 Mass. 277.

³ *Matter of New York*, 135 N. Y. 253.

⁴ *Cake v. Philadelphia & E. R.*, 87 Pa. 307. See *Wood v. Macon & B. R.*, 68 Ga. 539.

⁵ *Pennsylvania R. Appeal*, 93 Pa. 150.

⁶ *Pennsylvania R. Appeal*, 93 Pa. 150; *Groff's Appeal*, 124 Pa. 621. See also *Fenwick v. East London R.*, L. R. 20 Eq. 544.

⁷ *Spring Val. Water Works v. San Mateo Water Works*, 64 Cal. 123.

§ 178. The courts will not find the second undertaking to be in conflict with the first, unless their incompatibility is declared by law, or is patent in fact, for it is the duty of the judiciary to harmonize, if possible, all grants of public powers.¹ Hence, land appropriated for a railroad line may be included within a tract taken for a park, without express authority, when it appears that the railroad may run through the park without detriment to either public use, for it will be assumed that the legislature intended that both uses should be maintained.² But, ordinarily, a railroad is not consistent with the use of land for a park, and its promoters cannot take such land under a general authority.³ A highway may be laid along a strip of land used as a way for water-pipes,⁴ or over a school-house lot,⁵ and a pipe line may be laid across a poor-farm.⁶ But in the absence of direct authority a railroad cannot be run through a reservoir,⁷ or the grounds of a state institution.⁸

§ 179. The most common instance of location upon property already in public use is the crossing of a way by another. Where a strip of land is taken for the right of way of a highway, railroad, or turnpike, it is usually held that it may be crossed in future by another way built under a general authority.⁹ But if at the point of crossing the land is used not simply as a way, but is put to special uses, which would be impaired by the laying of the new way, a right to cross must be specially authorized.¹⁰ Thus, where a railroad is authorized to be laid across the track of another road, it cannot be run through an engine-

¹ *Rochester Water Comm.*, 66 N. Y. 413; *Wood v. Macon & B. R.*, 68 Ga. 539. See also *State v. American*, etc. News Co., 43 N. J. L. 381.

² *Suburban*, etc. R. v. New York, 128 N. Y. 510. See *People v. Park & O. R.*, 76 Cal. 156.

³ *Boston & A. R.*, 53 N. Y. 574.

⁴ *Boston v. Brookline*, 156 Mass. 172.

⁵ *Easthampton v. County Comm.*, 154 Mass. 424.

⁶ *Southwest. Pa. Pipe Line v. Directors of the Poor*, 1 Pa. C. C. 460.

⁷ *State v. Montclair R.*, 35 N. J. L. 328.

⁸ *St. Louis, J. & C. R. v. Institution*

for the Blind, 43 Ill. 303. See *Commonwealth v. Boston & M. R.*, 3 Cush. 25.

⁹ *Chicago & N. W. R. v. Chicago*, 140 Ill. 309; *Bridgeport v. New York & N. H. R.*, 36 Conn. 255; *St. Paul, M. & N. R. v. Minneapolis*, 35 Minn. 141. See *Valparaiso v. Chicago & G. T. R.*, 123 Ind. 467.

¹⁰ *Boston, H. T. & W. R.*, 79 N. Y. 64; *Prospect Park & C. I. R. v. Williamson*, 91 N. Y. 552; *Boston & M. R. v. Lowell & L. R.*, 124 Mass. 368; *Little Miami R. v. Dayton*, 23 Ohio St. 510; *Ft. Wayne v. Lake Shore & M. S. R.*, 132 Ind. 558.

house.¹ Nor can a city under a general authority to condemn land for a canal take land used as a railroad yard.² It has been held that an elevated railroad can be carried over a freight yard, where there is no other route, and the inconvenience is slight.³ By virtue of a statute authorizing cities to extend streets "over or across any railroad track, right of way or land of any railroad company," a street may be laid across a collection of railroad tracks, used as a yard, either at or above grade.⁴ Where the land required for a way is to be taken in fee, there is not an implied right to cross another way, for this would disrupt the latter.⁵

§ 180. The longitudinal occupation of one way by another presents no such necessity as constrains the implication of a right to carry a way across another. Therefore, where such occupation is desired, a warrant for it must be expressed, or clearly implied.⁶ Thus, a railroad company, acting under a general authority, cannot build along a highway,⁷ nor occupy the route of another railroad.⁸ Nor will authority to construct between certain termini permit a railroad company to use the location of a railroad running between the same points,⁹ or a turnpike company to lay the pike upon a highway.¹⁰ A telegraph company, authorized to erect their plant "along and parallel to" a railroad, cannot place it on a railroad right of way.¹¹ Where a railroad may be built so as to "cross, intersect, join, and unite" with another, a right of way over the latter for some distance cannot be condemned.¹² In the absence of special authority,

¹ *Albany Northern R. v. Brownell*, 24 N. Y. 345.

² *Matter of Buffalo*, 68 N. Y. 167. See *Comm. v. Detroit, G. H., etc. R.*, 93 Mich. 58.

³ *Pittsburgh Junction R. v. Allegheny Val. R.*, 146 Pa. 297.

⁴ *Illinois Cent. R. v. Chicago*, 141 Ill. 586.

⁵ *Matter of Buffalo*, 72 Hun, 422. See *Comm. v. Michigan Cent. R.*, 90 Mich. 385.

⁶ *Ft. Wayne v. Lake Shore & M. S. R.*, 132 Ind. 558; *Cent. City R. v. Ft. Clark R.*, 81 Ill. 523.

⁷ *Springfield v. Conn. River R.*, 4

Cush. 63; *Morris & E. R. v. Newark*, 10 N. J. Eq. 352; *Davis v. East Tenn. V. & G. R.*, 87 Ga. 605; *St. Louis, V. & T. H. R. v. Haller*, 82 Ill. 208. See § 397.

⁸ *Alexandria & F. R. v. Alexandria & W. R.*, 75 Va. 780.

⁹ *Housatonic R. v. Lee & H. R.*, 118 Mass. 391. See *Mobile & G. R. v. Alabama Midland R.*, 87 Ala. 501.

¹⁰ *Groff v. Bird in Hand Turnpike*, 144 Pa. 150.

¹¹ *Postal Tel. Co. v. Norfolk & W. R.*, 88 Va. 920.

¹² *Illinois Cent. R. v. Chicago, B. & N. R.*, 122 Ill. 473.

a railroad right of way cannot be subjected to a highway,¹ or a public ditch.²

§ 181. The owner of land devoted to private use is, unless favored by statute,³ seldom in a position to question the selection of his property for public use. He cannot urge the unsuitableness of the land, nor suggest engineering or financial difficulties in opposition to its selection. Questions of feasibility are not within his province.⁴ Nor can he show that another location would be less harmful to private property.⁵ But it seems that if a selection be made capriciously or wantonly, the owner may resist.⁶

A question of some nicety arises when a corporation seeks to condemn land for a use for which land already under its control appears to be available. The sound proposition has been suggested, that if a corporation has a convenient way over its own land, it cannot condemn a way over the land of another.⁷ But condemnation should be permitted, unless the propriety of using property in possession is so manifest as to render further acquisition a reckless interference with private rights.⁸ Where a railroad company attempt to build over a sidewalk, the owner cannot have the location changed, so that the road shall be built upon improved property in which the company appear to hold an interest.⁹ A railroad company leased land, acquired by purchase, for a pleasure resort. In order to facilitate the handling of its passenger traffic, it proceeded to condemn land for a new station, whereupon the owner asserted that as the land leased was not used for railroad purposes, and was suited for the station,

¹ *Bridgeport v. New York & N. H. R.*, 36 Conn. 255. See also *New Jersey South. R. v. Long Branch Comm.*, 39 N. J. L. 28. Phila. 491; *New York & H. R. v. Kip*, 46 N. Y. 546; *Lecoul v. Police Jury*, 20 La. An. 308.

² *Baltimore & O. R. v. North*, 103 Ind. 486.

³ See § 175.

⁴ *Coffman v. Griffin*, 17 W. Va. 178. See § 50.

⁵ *New York & E. R. v. Young*, 33 Pa. 175. See also *Eversfield v. Mid Sussex R. R.*, 3 De G. & J. 286.

⁶ *Second St.*, 23 Pa. 346. See also *Anspach v. Mahanoy & B. M. R.*, 5

⁷ *New Central Coal Co. v. George's Creek, C. & I. Co.*, 37 Md. 537. See also *Rochester & G. R.*, 12 N. Y. Supp. 566; *Manhattan Co. Case*, 22 Wend. 653; *Split Rock Cable Road*, 128 N. Y. 408; *Lamb v. North London R.*, L. R. 4 Ch. 522.

⁸ *Boyd v. Negley*, 40 Pa. 377; *Stark v. Sioux City & P. R.*, 43 Iowa, 501.

⁹ *Schmitz v. Union El. R.*, 50 Hun, 407.

the condemnation of other land was unnecessary. Although the lease was revocable, the right to condemn was sustained.¹

Relocation.

§ 182. Where an undertaking of public purpose has been definitely located, in the exercise of such discretion as has been allowed to its promoters, the power of choice is generally exhausted. A change of site cannot be made, unless authorized by statute.² This statement applies to property purchased, as well as to property condemned.³ A bridge company, having selected a line of approach within a district defined by statute, cannot thereafter change it. The legislature intended that a definite location should be made, not that the power to condemn should be suspended indefinitely over the district.⁴ Nor can relocation be compelled at the sole instance of public authorities, acting ministerially in the interests of public convenience and safety, for, as the location is made by legislative sanction, the power to relocate must be derived from the same source.⁵

The rule as to relocation has been overcome in cases where its maintenance would, in the opinion of the court, lead to great public inconvenience. Thus, where a railroad bridge was destroyed, and the corporation was not able to rebuild at its own cost, it was permitted to join with another company in the erection of a bridge upon another site, and make the necessary connections, under the charter power to construct, repair, and maintain a railroad.⁶ The rule should not be applied where the public agents do not desire to relocate the undertaking itself, but wish to change the site of an incidental work. Thus, land may

¹ New York Cent. & H. R. R., 59 Hun, 7. *v. Central R.*, 31 N. J. L. 205. See *Cape Girardeau Road v. Dennis*, 67 Mo. 438; *Eel River & E. R. v. Field*, 67 Cal. 429.

² *Hudson & D. Canal v. New York & H. R.*, 9 Paige, 325; *Neal v. Pittsburgh & C. R.*, 2 Grant's Cas. 137; *Morrow v. Commonwealth*, 48 Pa. 305; *Little Miami R. v. Naylor*, 2 Ohio St. 235. See also *Turnpike Society v. Homer*, 12 Conn. 361; *Brigham v. Agricultural Branch R.*, 1 Allen, 316; *Commonwealth v. Pittston Ferry Bridge*, 148 Pa. 621; *Morris & E. R.*

³ *Providence & W. R.*, 17 R. I. 324.

⁴ *Poughkeepsie Bridge Co.*, 108 N. Y. 483.

⁵ *State v. New Haven & N. Co.*, 45 Conn. 331.

⁶ *Mississippi & T. R. v. Devaney*, 42 Miss. 555.

be condemned for the site of a new lock-house.¹ The fact of location must be clearly shown in order to terminate the discretion of the promoters.² It has been held that a statutory right to relocate does not warrant the relocation of a completed undertaking.³

Conflicting Claims to Location.

§ 183. The law with regard to the condemnation of property already in public use is considered elsewhere.⁴ It sometimes happens, that the issue in such cases is pushed back to the radical question as to which of two claimants has established title to the property. Where one has purchased property with the intention of putting it to public use, he cannot be divested of it by a party seeking to condemn it for a similar use.⁵ But the purchase, to be effective, must be consummated before a location is made under the eminent domain.⁶ Where a corporation duly filed a survey of property required, and another corporation afterwards recorded a deed from the owner, executed in pursuance of an unrecorded agreement made before the survey, priority was given to the first corporation, because it was not affected with notice of the agreement. Nor was it deemed material that a location by survey did not constitute a complete appropriation as against the landowner, for his position had no bearing on the controversy between the rival claimants.⁷

Where the conflict is between parties seeking to condemn, that one shall prevail who first makes a location in accordance with the statute.⁸ The adoption by resolution of an unauthorized

¹ *Ligat v. Commonwealth*, 19 Pa. 456. *York, L. E. & W. R.*, 110 N. Y. 128; *Pocantico Water Works v. Bird*, 130

² See *Philadelphia & G. F. R. Appeal*, 102 Pa. 123; *New York, L. & W. R.*, 88 N. Y. 279. N. Y. 249; *Waterbury v. Dry Dock, E. B. & B. R.*, 54 Barb. 388; *Lake Merced Water Co. v. Cowles*, 31 Cal. 215;

³ *Moorhead v. Little Miami R.*, 17 Ohio, 340; *Atkinson v. Marietta & C. R.*, 15 Ohio St. 21. *Titusville & P. C. R. v. Warren & V. R.*, 12 Phila. 642. See also *New York & A. R. v. New York & W. S. R.*, 11

⁴ See §§ 97, 98, 177-180.

⁵ *Elting Woolen Co. v. Williams*, 36 Conn. 310. *Abb. N. C.* 386; *Chesapeake & O. Canal v. Baltimore & O. R.*, 4 Gill & J. 1;

⁶ *Sioux City & D. M. R. v. Chicago, M. & S. P. R.*, 37 Fed. Rep. 770. *Contra Costa R. v. Moss*, 23 Cal. 324; *Manchester, S. & L. R. v. Gt. Northern R.*, 9 Hare, 284; *Indianapolis St. Ry. v. Citizens' St. Ry.*, 127 Ind. 369; *Coe v. New Jersey Midland R.*, 31 N. J. Eq.

⁷ *Barre R. v. Granite R.*, 61 Vt. 1.

⁸ *Rochester, H. & L. R. v. New*

survey is not such a location as will prevail against one subsequently made in conformity to the statute,¹ nor is priority secured by making an experimental survey, which is not adopted.² A railroad company attempted to enjoin a rival corporation from adopting a particular route, alleging that the second corporation was organized, and the route selected, in bad faith, for the purpose of thwarting the complainant's plan of location. Upon answer filed explicitly denying bad faith, the injunction was refused.³

QUANTITY OF PROPERTY TO BE CONDEMNED.

§ 184. This subject will be investigated on two lines. First. The quantity of property that may be taken in order to accomplish the public use. Second. How far the condemnation of a part of a tract of land may effect the taking of the whole.

§ 185. **How much Property may be taken?** — If there is no statutory direction as to the quantity of property to be condemned, the expropriator may take as much as is necessary for the accomplishment of the purpose.⁴ Where a corporation is authorized to take water from a pond it is not limited to the surplus water.⁵

The right of selection is subject, however, to judicial restraint, for the taking of more property than is necessary for the accomplishment of the purpose is, in effect, a taking for private use.⁶ Thus, land cannot be condemned for speculative purposes,⁷ nor for the purpose of forestalling the probable location of a rival

105; *Railroad Co. v. Alling*, 99 U. S. 463. *Cent. R. v. Cornell University*, 49 Wis. 162; *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Smith v. Chicago & W. I. R.*, 105 Ill. 511; *Williams v. School Dist.*, 33 Vt. 271; *Kemp v. South Eastern R.*, L. R. 7 Ch. 364; *Errington v. Met. Dist. R.*, 19 Ch. D. 559.

¹ *New Brighton & N. C. R. v. Pittsburgh, Y. & C. R.*, 105 Pa. 13.

² *Morris & E. R. v. Blair*, 9 N. J. Eq. 635. See also *Williamsport v. Philadelphia & E. R.*, 141 Pa. 407.

³ *Morris & E. R. v. Blair*, 9 N. J. Eq. 635.

⁴ *Pittsburgh, F. W. & C. R. v. Peet*, 152 Pa. 488; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Cotton v. Mississippi & R. R. Boom Co.*, 22 Minn. 372; *Wisconsin*

⁵ *Ingraham v. Camden & R. Water Co.*, 82 Me. 335.

⁶ *Chesapeake & O. Canal v. Mason*, 4 Cranch C. C. 123; *Tracy v. Elizabethtown, L. & B. S. R.*, 80 Ky. 259.

⁷ *Rensselaer & S. R. v. Davis*, 43 N. Y. 137.

corporation,¹ nor to promote the private interests of stockholders.² A city, authorized to condemn for a water supply, cannot condemn a dam, the existence of which will not affect the supply.³ The same limitation of necessity is imposed upon the "damaging"⁴ of property for public use. Thus, where an unreasonable flooding of land is due to the lack of proper culverts in an embankment, proper culverts must be built.⁵

§ 186. Must the necessary quantity of property be determined with sole reference to the present necessities of the undertaking? There is this much reason in an affirmative answer, that it contemplates the retention of property in private hands until it is needed for public use, and the appraisal of property at the time when it is required. These considerations warrant the general proposition, that a present necessity should appear. But this must not be so strictly construed as to unduly cramp the promoters in the execution of a reasonably comprehensive plan.⁶ It is difficult to formulate the exceptions to the rule, but the following cases indicate their character. An aqueduct company may acquire the right to enough water to insure a sufficient supply in case of drought,⁷ or to anticipate the growing demands of their district.⁸ Where a railroad company sought to condemn land for terminal purposes, and it appeared that another company intended to connect with the petitioners' road, and that from the contracts made, expenditures incurred, etc., the connection would be made, condemnation was permitted as for a use plainly necessary in the immediate future.⁹

§ 187. **Statutory Direction as to Quantity.** — The legislature may prescribe the quantity of land necessary for the purposes of the work. Where power is given to lay out a street as wide as Frankfort Street, and not less than fifty-two feet wide, and it

¹ *Rensselaer & S. R. v. Davis*, 43 152 Pa. 488; *Lodge v. Phila., W. & B. N. Y.* 137. R., 8 Phila. 345.

² See *Stockton & D. R. v. Brown*, 9 ⁷ *Olmsted v. Morris Aqueduct*, 46 H. L. C. 246. N. J. L. 495; s. c. 47 N. J. L. 311;

³ *Kane v. Baltimore*, 15 Md. 240. *Pocantico Water Works v. Bird*, 130

⁴ See §§ 153-158. N. Y. 249.

⁵ *Ohio & M. R. v. Wachter*, 123 Ill. ⁸ *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528.

⁶ *Pittsburgh, F. W. & C. R. v. Peet*, ⁹ *Staten Island Rapid Transit Co.* 440. 103 N. Y. 251.

appears that the street referred to is but thirty-five feet wide, the specific description controls.¹ Expropriators are frequently limited to a maximum quantity of property, especially in the matter of width of right of way. This limitation must be strictly observed.² Where a corporation is limited as to width of way, it cannot nullify the limitation by constructing a second way alongside the first.³ Where a corporation is authorized to condemn a way of not more than a certain width it is presumed to appropriate the maximum width, unless it can show affirmatively the appropriation of a smaller quantity.⁴ A water company, authorized to appropriate not more than seven hundred and fifty thousand gallons a day, is presumed to take that quantity.⁵ Corporations, limited to a certain width of way, have been allowed to condemn such additional land as may be needed for embankments, and other works necessary to the making of a safe and convenient way.⁶

How much Property may the Public Agent be compelled to Take.

§ 188. The principle that the quantity of property to be paid for shall be, in case of difference, that lost by the owner, rather than that gained for the public use, is elsewhere stated, and to some extent illustrated,⁷ especially in the rule, that where part of a tract is taken compensation must be paid for certain damage to the remainder.⁸ It is our present purpose to define a tract within the rule, and then to consider a statutory extension of the rule, whereby the owner of a tract may compel the absolute appropriation of the whole, though only a part is needed for the public use.

¹ New York & B. Bridge Co., 72 398, Philadelphia & R. R. v. Obert, N. Y. 527. 109 Pa. 193; Prather v. Jeffersonville,

² Ramsey County v. Stees, 28 Minn. M. & I. R., 52 Ind. 16.

326; Pittsburgh Nat. Bank v. Shoenberger, 111 Pa. 95; State v. Hudson Co., 82 Me 335.

³ Ingraham v. Camden & R. Water Co., 82 Me 335. ⁴ South Brooklyn, R. & T. Co., 50 Hun, 405; Johnston v. Chicago, M. & S. P. R., 58 Iowa, 537; Booker v. Venice & C. R., 101 Ill. 333. See Mayo v. Springfield, 136 Mass. 10.

⁵ Road Case, 4 W. & S. 39.

⁶ Jones v. Erie & W. V. R., 144 Pa. 629; Duck River R. v. Cochrane, 3 ⁷ See §§ 74, 134.

Lea, 478. See Jones v. Tatham, 20 Pa. ⁸ See § 136.

§ 189. **What is a Tract within the Rule that the Taking of Part of a Tract is a Taking of the Whole?** — A tract is, strictly speaking, a corporeal thing, — land in its physical sense. Yet land and its appurtenant easements may be viewed as a tract, in applying the rule under consideration. Thus, where a riparian easement is condemned, compensation is assessed in respect to the damage to the riparian land. So, where a private easement in a street is condemned, substantial compensation is awarded only for injury to the lot to which the easement appertains.¹

It is evident that the property claimed to be a single tract must be owned or controlled by the claimant. But it is not necessary that it should be all held by the same tenure. Thus, if one owns a lot, and controls an adjacent lot as tenant, both may make a single tract.²

As a rule, two or more parcels of land do not form a single tract unless they are contiguous. The parcels may form a tract although lying in two counties,³ or divided by the section lines of government subdivisions,⁴ or intersected by a street the fee of which is in the owner,⁵ especially if the street exists only on a map made by the owner.⁶ Where parcels are divided by a street, the fee of which is in the public, it has been held that they do not make a single tract.⁷ The mere fact that parcels of land are connected by a right of way does not make them a single tract.⁸ A farm which is crossed by a railroad over which there are no farm crossings, is not necessarily divided into separate tracts,⁹ unless the railroad company own their land in fee.¹⁰ But it has been decided, that when a railroad corporation condemned a way

¹ *Newman v. Met. El. R.*, 118 N. Y. kosh & M. R. R., 33 Wis. 629; *Renwick* 618; *Bohm v. Met. El. R.*, 129 N. Y. v. D. & N.W. R., 49 Iowa, 664; *Hannibal* 576. See *Penn Mut. Life Ins. Co. v. Bridge Co. v. Schaubacher*, 57 Mo. 582. *Heiss*, 141 Ill. 35.

² *Chicago & E. R. v. Dresel*, 110 Ill. 52 N. J. L. 381. 89; *Holt v. Gas Light, etc. Co.*, L. R. 7 Q. B. 728.

³ *Atchison & N. R. v. Gough*, 29 Kan. 94.

⁴ *Ham v. Wisconsin, I. & N. R.*, 61 Iowa, 716; *Chicago, M. & S. R. v. Baker*, 102 Mo. 553.

⁵ *New York, E. S. & B. R. v. Le Fevre*, 27 Hun, 537; *Peck v. Superior*, etc. R., 36 Minn. 343; *Chapman v. Osh-*

⁶ *Currie v. Waverly & N. Y. B. R.*, 52 N. J. L. 381.

⁷ *New York Cent. & H. R. R.*, 6 Hun, 149. See also *Currie v. Waverly* & N. Y. B. R., 52 N. J. L. 381.

⁸ *Pennsylvania Co. for Ins. v. Pennsylvan* S. V. R., 151 Pa. 334.

⁹ *Chicago & W. M. R. v. Huncheon*, 30 N. E. Rep. 636 (Ind. 1892).

¹⁰ *Cameron v. Chicago, M. & S. P. R.*, 42 Minn. 75.

across a farm, and afterwards condemned additional land on one side of the way, the tract, in the latter case, was bounded by the railroad.¹ Land may be "held with" other land, though a railroad runs between, where all the land is used by a single owner as a building estate.² A farm, cut by a canal, may be considered a single tract.³

§ 190. The mere contiguity of parcels of land under one control does not, necessarily, make them a single tract. They must be devoted to a single use. Where adjoining parcels are used together for business or other purposes, they may be viewed as a single tract.⁴ Where the land taken contained gravel, the railroad company, to whom it belonged, were not allowed to show the special utility of the gravel to the railroad system for the purpose of obtaining compensation for injury to the railroad.⁵ In condemning the property of a toll-bridge corporation, in order to make the bridge free, it has been held that compensation need not be paid for a toll-house built upon land adjoining the way.⁶

There may be cases where detached parcels of land, used for a single purpose, should be considered a single tract, because of their peculiar interdependence; for example, a mill site and a reservoir.⁷ But the mere interdependence of separate parcels from a business standpoint is immaterial. Thus, a quarry, a sales-yard, and a shipping station, situated at different points, cannot be viewed as a single tract. Their connection is purely incidental.⁸

The requirement that a tract must be land put to a single use may operate so as to divide property which would be otherwise viewed as a whole. Thus, where a plot of sixty-five acres

¹ New York Cent. & H. R. R., 6 Holt v Gas Light, etc. Co., L. R. 7 Q. Hun, 149. But see Chicago & P. R. v. B. 728.

Hildebrand, 136 Ill. 467. ⁵ Providence & W. R. v. Worcester,

² Essex v. Local Board, etc., 14 App. 155 Mass. 35.

Cas. 153. ⁶ Central Bridge v. Lowell, 15 Gray,

³ Cameron v. Pittsburgh & L. E. R., 106. Compare Montgomery County v. Schuylkill Bridge, 110 Pa. 54.

⁴ New York, W. S. & B. R. v. Bell, ⁷ See Potts v. Pennsylvania S. V. R., 119 Pa. 278; Ripley v. Gt. North-
28 Hun, 426; Chicago & E. R. v. Dresel, ern R., L. R. 10 Ch. 435.

110 Ill. 89; Hannibal Bridge v. Schaubacher, 57 Mo. 582; Cummins v. Des ⁸ Potts v. Pennsylvania S. V. R.,
Moines & St. L. R., 63 Iowa, 397, Doud 119 Pa. 278.
v. Mason City & F. D. R., 76 Iowa, 438;

lay partly within the limits of a city and partly without, and a right of way was condemned through the urban section, the owner sought to have compensation assessed with reference to injury to the suburban section. This was refused, on the ground that farm land and town land, though adjacent and held by one title, were too dissimilar to constitute a single tract.¹ It has been decided, however, that a lot occupied by a building, which was leased for a store and tenement purposes, and by other buildings, may be treated as a single tract.² A building abutting on two streets, and leased as a whole to one who sublets to various parties, is to be treated as a single property in an action for compensation brought by the owner against a corporation operating a railroad in one of the streets.³

The mere fact that adjacent lots are put to similar uses will not make them a single tract,⁴ but land mapped into lots is not thereby broken into separate tracts, if it is actually put to a single use.⁵ The use must exist at the time of condemnation. It is immaterial that the parcels in question had been used together.⁶

The stability of the use to which the tract is put is of no concern to the expropriator. Thus, three adjoining parcels were used as a rifle range by the owner of the first and third, who had acquired the right to shoot over the second. The second was condemned, and it was held that the three parcels formed a tract used for a single purpose, although the right over the second was precarious.⁷

§ 191. **Condemnation of whole Tract.** — The state has, in some cases, deemed it just and expedient that the expropriators shall, or may be compelled to, acquire the whole tract, although only a part is necessary for the furtherance of the public use in question. According to the Lands Clauses Act, "no party shall

¹ *Haines v. St. Louis, D. M. & N. R.*, Minn. 439; *Evansville & R. R. v. Charlton*, 33 N. E. Rep. 129 (Ind. 1893).
65 Iowa, 216.

² *Whitney v. Boston*, 98 Mass. 312. ⁵ *Port Huron & S. W. R. v. Voorheis*, 50 Mich. 506.
Compare *Mooney v. New York El. R.*, 16 Daly (N. Y.), 145.

³ *Bischoff v. New York El. R.*, 138 N. Y. 257. ⁶ *Peck v. Superior, etc. R.*, 36 Minn. 343.
⁷ *Holt v. Gas Light, etc. Co., L. R.*

⁴ *Wilcox v. St. Paul & N. R.*, 35 7 Q. B. 728.

at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party shall be willing and able to sell and convey the whole thereof."¹ This section is liberally interpreted in the interest of the owner. Coke's definition of a house, "buildings, curtilage, orchard, and garden, . . . even six acres of land may be part of a house,"² has been adopted.³ The definition of a manufactory is equally broad. It covers all property the use of which can be fairly said to be necessary and convenient for carrying on the manufacture in question.⁴ The Model Act of 1847 authorizes the City of London to recoup itself, in certain cases, for the expense of opening new streets, by condemning abutting property, and selling or leasing it, and it may contract with reference to such property before opening the street.⁵

§ 192. The French law is still more favorable to the owner of land. In addition to the English rule as to buildings, it enables the owner of a tract, three-fourths of which is taken, to compel the expropriator to acquire the remainder, where this is less than ten *ares*,⁶ and is not contiguous to other land of the owner.⁷ In Paris, and the principal cities of France, if the taking of part of a lot for a street would leave a remainder of such shape and size as to be unfit for proper improvement, the authorities may take the whole. If the owner of adjoining land desires this remainder, it shall be conveyed to him upon payment of its value. In case the adjoining owner shall not elect to take it within a certain time, as much of his own land may be taken as will, when added to the remainder, make a suitable building lot.⁸

§ 193. That part of the foreign legislation cited, which contemplates the exercise of the eminent domain in furtherance of an economical and advantageous disposition of building lots,

¹ Sect. 92.

² Co. Litt. 56.

³ *Barnes v. Southsea R.*, 27 Ch. D. 536. See also *King v. Wycombe R.*, 28 Beav. 104.

⁴ *Sparrow v. Oxford, W. & W. R.*, 2 De G. M. & G. 94; *Furniss v. Midland R.*, L. R. 6 Eq. 473; *Richards v. Swansea, I. & T. Co.*, 9 Ch. D. 425.

⁵ *Galloway v. London*, L. R. 1 H. L. 34.

⁶ An *are* is something over 119 square yards.

⁷ "Loi du 3 mai, 1841," *Sur L'Expropriation*, etc.; Art. 50, as amended by "Loi du 7 juillet, 1863."

⁸ Crépon, *Code Annoté de L'Expropriation*, 426.

is not in touch with the American idea of legislative power. If such legislation were upheld by our courts, the definition of a public use would certainly be extended beyond the range of the adjudged cases.¹

Nor have we adopted generally the law which enables an owner to throw upon the state or its agent the remainder of a tract which has been decreased in value by the condemnation of a part, although it has been held that where the part left is practically worthless compensation should be paid for the value of the whole.² Such legislation is not unknown, however. Thus, a city has been compelled to accept a surrender of lots cut by a street, and pay compensation.³ There is no constitutional objection to the acquisition by a municipal corporation of remainders of lots left by the opening of streets, if the owners assent.⁴ But, as a rule, where part of a tract is condemned, the owner retains the remainder, and is entitled to have compensation for the damage done to the whole.⁵ By this course substantial justice may be done to the owner, although his assurance of full indemnification for all possible loss is not, perhaps, as complete as it is under the foreign system. But there may be injustice done if benefits are assessed against a remainder so small as to be useless unless joined to adjacent land.

RIGHTS OF PARTIES BEFORE THE TAKING IS COMPLETED.

§ 194. Where it appears that certain property is likely to be condemned, it is frequently placed at a disadvantage. The right of eminent domain suspended over property is apt to render its sale difficult, if not impossible, and to discourage any expansion of its utility. It is important to determine to what extent this disadvantage can be imposed without liability, and what are the rights of the parties during the suspension of the eminent domain.

A general proposition which should be kept in view in dealing

¹ See *Dunn v. Charleston*, Harp. L. 189; *Albany Street*, 11 Wend. 150; *Embury v. Connor*, 3 N. Y. 511. *gan v. Boston*, 12 Allen, 223. See also *Boulat v. Municipality No. 1*, 5 La. An. 363; *Dunn v. Charleston*, Harp. L. 189.

² See § 257.

³ *Baltimore v. Clunet*, 23 Md. 449; *Black v. Baltimore*, 50 Md. 235; *Dor-*

See *Gregg v. Baltimore*, 56 Md. 256.

⁴ *Embury v. Connor*, 3 N. Y. 511.

⁵ See § 254.

with the present subject is this: Any inconvenience or loss due to the anticipation of condemnation is not a legal injury, provided the suspension of the eminent domain is not prolonged beyond the reasonable time which should be accorded the projectors of public works within which to determine the feasibility of their undertaking, and the suitability of the property in question.¹

§ 195. **Entry for Survey.** — When an undertaking is projected, entry upon land is often permitted for the purposes of exploration and survey, so that the promoters may be apprised of the advantages and disadvantages of the property before making a definite location. Such a survey is not a taking, and, though a technical trespass, is not actionable where it is conducted in a reasonable manner.² So, it is not a taking to enter on land for the purpose of surveying public boundary lines.³ But the survey, to be harmless, must be such as can be made without disturbing the soil. Thus, a company, desiring to make a tunnel, cannot justify the digging of a shaft as a survey.⁴ Nor, under pretence of exploration, can land be occupied experimentally in order to test its fitness for the proposed work.⁵ An act authorizing the construction of a section of an elevated railway in a street, in order to test, by experiment, improved methods of construction and operation, was declared unconstitutional because compensation was not provided for the taking of private easements.⁶ Where land is entered upon and trees cut down in the prosecution of the coast survey there is a taking of property.⁷

§ 196. **Discontinuance of Proceedings.** — Where proceedings to condemn are commenced, may they be discontinued; and, if so when, and upon what conditions? Where the state may compel

¹ *Shoemaker v. United States*, 147 U. S. 282; *Martin v. Brooklyn*, 1 Hill, 545; *Cedar Rapids*, 51 N. W. Rep. 1142 (Iowa, 1892); *Stevens v. Danbury*, 53 Conn. 9.

² *Bonaparte v. Camden & A. R.*, Bald. C. C. 205; *Polly v. Saratoga & W. R.*, 9 Barb. 449; *Walther v. Warner*, 25 Mo. 277; *Oregonian R. v. Hill*, 9 Or. 377. See also *McClain v. People*, 9 Col. 190.

³ *Winslow v. Gifford*, 6 Cush. 327.

⁴ *Morris & E. R. v. Hudson Tunnel Co.*, 25 N. J. Eq. 384.

⁵ *Ash v. Cummings*, 50 N. H. 591. See § 133.

⁶ *People v. Loew*, 102 N. Y. 471.

⁷ *Orr v. Quimby*, 54 N. H. 590.

its corporations to condemn,¹ it seems that it may compel the continuance of proceedings. But a private person cannot prevent the discontinuance of proceedings to condemn, in the sense of compelling the completion of an undertaking which has been found to be inexpedient. A city, intending to open a street, advertised for bids for the houses on the line of the improvement, and afterwards decided to abandon the work. The highest bidder attempted to compel the continuance of the proceedings in order that he might secure the buildings, but it was held that he had no interest which would enable him to coerce the city into carrying out the work.²

The owner of property against which proceedings are directed may have an interest in their continuance in this respect: In case discontinuance is attempted after the taking is complete, he may insist upon continuance, not for the purpose of completing the work, but simply to obtain the compensation which is his due. Recession, after the taking is complete in law, is practically an abandonment of the work so far as the property in question is concerned. The owner is entitled to compensation, and resumes dominion over his property. Thus, where an entry on one of the tracts over which a highway is projected effects, according to the statute, the taking of all the rest, the owners of the latter may have full compensation, although the work is abandoned before completion, and their possession is never disturbed in fact.³ The rule is certainly just, in this, that it prevents the indefinite subjection of land to a public easement without compensation until the authorities choose to take actual possession.⁴ But, as it may bear hardly upon the public where the undertaking is definitely relinquished within a reasonable time, the legislature has, in some cases, provided that in this event the owner shall have damages only for losses actually sustained.⁵

§ 197. The existence and extent of a right to discontinue depend, then, upon the point of time at which the right to

¹ See § 105.

² *State v. Graves*, 19 Md. 351.

³ *Wheeler v. Fitchburg*, 150 Mass.

350. See also *Kent v. Wallingford*, 42 Vt. 651; *Kimball v. Rockland*, 71 Me.

137. See *Stiles v. Middlesex*, 8 Vt. 436.

⁴ See § 201.

⁵ *New Bedford v. County Comm.*, 9 Gray, 346. See *Kimball v. Rockland*, 71 Me. 137.

compensation vests. The English rule is that upon service of a notice to treat upon the property owner, the promoters are liable for compensation,¹ unless the owner gives a counter-notice demanding that the whole of the premises shall be taken instead of the part described. But a statute, authorizing the abandonment of an undertaking before compensation is paid, may provide that the owner shall be indemnified for actual damage only.²

The constitutional and statutory provisions in respect to the point of time at which property is taken, and the right to compensation vests, are, in this country, so diverse that the only generalization possible is, that when the point has been passed, the proceedings to condemn cannot be freely discontinued, so far as the rights of the property owner are concerned.³ Where the assessment of compensation precedes the taking, the proceedings may be discontinued at any time before assessment.⁴

§ 198. May proceedings be discontinued after the ascertainment of compensation? It is usually held that, in the absence of statutory direction to the contrary, the state or a political corporation should be enabled to count the cost of property before taking title, so that the public interests may not suffer by reason of the undertaking of works the cost of which will exceed the benefit.⁵ Even under the English statute it has been decided that service of a notice to treat does not bind a political corporation.⁶ It has been held that where proceedings to open a street are instituted, and the owners interested may appeal from the awards, the city cannot, in the absence of direct authority, refuse to treat a judgment for compensation, recovered by a single owner, as final, until it can count the cost of the work after all the awards have been determined on appeal.⁷ Where a landowner

¹ *Reg. v. Birmingham & O. R.*, 6 Ry. Cas. 628; *Morgan v. Metropolitan R.*, L. R. 4 C. P. 97. *Stevens v. Danbury*, 53 Conn. 9; *Lafayette v. Shultz*, 44 Ind. 97; *Comm. of Washington Park*, 56 N. Y. 144; *Drury v. Boston*, 101 Mass. 439; *Lamb v. Schottler*, 54 Cal. 319; *Black v. Baltimore*, 50 Md. 235. See *Jones v. Oxford*, 45 Me. 419.

² *Uxbridge & R. R.*, 43 Ch. D. 536.

³ *People v. Syracuse*, 78 N. Y. 56.

⁴ See *Dayton & W. R. v. Marshall*, 11 Ohio St. 497.

⁵ *Shoemaker v. United States*, 147 U. S. 282; *Mabon v. Halstead*, 39 N. J. L. 640; *O'Neill v. Freeholders*, 41 N. J. L. 161; *Bloomington v. Miller*, 84 Ill. 621; *Carson v. Hartford*, 48 Conn. 68;

⁶ *Queen v. Comm.*, 15 Ad. & El. n. s. 761.

⁷ *Myers v. South Bethlehem*, 149 Pa. 85.

recovered judgment against a city for taking land for a right of way, which judgment was affirmed on appeal, the city cannot have the judgment set aside on the ground that it has decided not to open the way.¹

It has been intimated that the English rule is proper when a private corporation is the actor; that, in this case, no consideration of public policy prevents the selection of property without the owner's consent from being treated as a contract to pay its value.² This principle is sometimes incorporated in the statute.³ But in other statutes the legislature places the private grantee of the eminent domain on the privileged plane of the political corporation, and contemplates a period, between the ascertainment of compensation and some act of confirmation or acceptance, during which the proceedings may be discontinued.⁴

The most favorable position accorded to the corporation is that it may freely discontinue at any time before actual tender or payment of compensation.⁵

§ 199. Where the right to discontinue exists it must be exercised in a reasonable manner. Thus, it has been held that the United States cannot institute proceedings against several tracts of land at the same time, in order that the cheapest may be finally selected.⁶ It has been decided that where proceedings have been discontinued, because of dissatisfaction with the award, they cannot be instituted again in the hope of obtaining a lower award.⁷ But where there is nothing to show that the first pro-

¹ *Myers v. South Bethlehem*, 149 Pa. 85.

² See *Water Comm. of Jersey City*, 31 N. J. L. 72; *Pollard v. Moore*, 51 N. H. 188.

³ *Old Colony R. v. Miller*, 125 Mass. 1.

⁴ *Rhinebeck & C. R.*, 67 N. Y. 242; *Waverly Water Works*, 85 N. Y. 478;

Stacey v. Vermont Cent. R., 27 Vt. 39. See also *Witt v. St. Paul & N. P. R.*, 35

Minn. 404; *Corbin v. Cedar Rapids, S. F. & N. R.*, 66 Iowa, 73; *Fox v. West. Pacific R.*, 31 Cal. 538.

⁵ *Baltimore & S. R. v. Nesbit*, 10

How. 395; *Merrick v. Baltimore*, 43 Md. 219; *State v. Cincinnati & I. R.*, 17 Ohio St. 103; *Chicago v. Barbican*, 80 Ill. 482; *Chicago, S. L. & W. R. v. Gates*, 120 Ill. 86; *Denver & N. O. R. v. Lamborn*, 8 Col. 380; *Gray v. St. Louis & S. F. R.*, 81 Mo. 126.

⁶ *Darlington v. United States*, 82 Pa. 382.

⁷ *Chicago, R. I. & P. R. v. Chicago*, 143 Ill. 641; *St. Joseph v. Hamilton*, 43 Mo. 282; *Rogers v. St. Charles*, 3 Mo. App. 41; *Hupert v. Anderson*, 35 Iowa, 578. See *State v. Minneapolis*, 40 Minn. 483.

ceedings were discontinued because of the largeness of the award, new proceedings may be instituted.¹

If property has been damaged by the corporation, pending proceedings which have been discontinued, full indemnity must be paid.² Although the owner's costs upon discontinuance should be paid by the corporation, it has been held that other expenses, and any inconvenience which may have been caused by the proceedings, must be borne without redress.³ But wherever a sufficient discretion in respect to the terms of discontinuance is reposed in the court, it seems just that the owner should be reimbursed for all necessary expenses.⁴

Rights of the Owner before the Completion of the Taking.

§ 200. The suspension of the right of eminent domain over property does not usually divest its owner of any rights of disposition or enjoyment. Thus, he may sell the property, and give good title to it;⁵ cultivate crops, and obtain compensation for their destruction in the event of appropriation;⁶ improve his land by proceeding with the construction of buildings already begun,⁷ and even commence new buildings.⁸

Viewed in the light of principle, the law of *lis pendens* has no effect upon property against which proceedings to condemn are directed.⁹ But it has been decided that such proceedings are within the purview of the California statute in respect to *lis pendens*.¹⁰

¹ Trustees, etc. v. Haas, 42 Ohio St. 239.

² Pittsburgh, F. W. & C. R. v. Swinney, 97 Ind. 586; McLaughlin v. Municipality No. 2, 5 La. An. 504; Van Valkenburgh v. Milwaukee, 43 Wis. 574.

³ Stevens v. Danbury, 53 Conn. 9; United States v. Oregon, R. & T. Co., 16 Fed. Rep. 524.

⁴ New York, W. S. & B. R. v. Thorne, 1 How. Pr. n. s. 190; Hudson River R. v. Outwater, 3 Sand. 689; Waverly Water Works Co., 85 N. Y. 478; North. Missouri R. v. Lackland, 25 Mo. 515. See Drury v. Boston, 101 Mass. 439.

⁵ Duluth Trans. Co. v. Northern Pacific R., 53 N. W. Rep. 366 (Minn. 1893).

⁶ Gilmore v. Pittsburgh, V. & C. R., 104 Pa. 275; Lafferty v. Schnylkill River R., 124 Pa. 297.

⁷ New York v. Mapes, 6 Johns. Ch. 46; Portland v. Lee Sam, 7 Or. 397.

⁸ Driver v. West. Union R., 32 Wis. 569; Sherwood v. St. Paul & C. R., 21 Minn. 122. See also Briggs v. Comm., 39 Kan. 90. But see Schnylkill Nav. Co. v. Farr, 4 W. & S. 362.

⁹ Curran v. Shattuck, 24 Cal. 427; Matter of Wall St., 17 Barb. 617.

¹⁰ Roach v. Riverside Water Co., 74 Cal. 263.

§ 201. What may be called the doctrine of inchoate condemnation bears on the present subject. It has been held that the legislature may authorize a city to file a map of a proposed street, and thereby so impress the land delineated with a public interest as to prevent the owner from recovering compensation, on the actual opening, for any improvements made subsequent to the filing.¹ The same conclusion has been reached where, at the passage of the law, there was no express constitutional requirement of compensation, the court holding that if compensation were necessary it could be made in any form, and that in the case at bar the owner had received ample compensation in the adoption of a general plan for municipal improvement.² The effect of the decisions cited is to affect property with a public lien which will hinder its sale and improvement. This detriment is certain. The compensatory benefit suggested is illusory, for the opening of the street cannot be compelled by the owner; therefore, there is a restraint on the enjoyment of land for the sake of a projected use which may never materialize. The unconstitutionality of inchoate condemnation has been declared in well-reasoned opinions.³

¹ *District City of Pittsburgh*, 2 W. & S. 320; *Sedgeley Ave.*, 88 Pa. 509; *Shaber v. Reading*, 150 Pa. 402.

² *Furman St.*, 17 Wend. 649; *One Hundred & Twenty-seventh St.*, 56 How. Pr. 60. But see *Forster v. Scott*, 136 N. Y. 577.

³ *Forster v. Scott*, 136 N. Y. 577; *State v. Comm.*, 37 N. J. L. 12; *Moale v. Baltimore*, 5 Md. 314; *Baltimore v. Hook*, 62 Md. 371. See also *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Wheeler v. Fitchburg*, 150 Mass. 350.

CHAPTER IX.

THE ESTATE OR INTEREST CONDEMNED.

§ 202. The legislature may, and usually does, determine the estate or interest to be acquired in property condemned,¹ unless it is limited by constitutional declaration. But it may delegate this power to a tribunal,² permit the corporation to decide as to what interest is necessary to accomplish the purpose in hand,³ or leave the matter to the discretion of a court.⁴

§ 203. **The Interest prescribed must be Condemned.** — Where the legislature prescribes the interest to be condemned, that interest only can be acquired.⁵ This proposition stands for the benefit of the public, whose interests are, presumably, better served by the acquisition of the interest prescribed. It also stands for the benefit of the property-owner, who may resist condemnation when it is directed to the taking of an unlawful interest, or may, in another case, compel the expropriators to take, and pay for, a greater estate than they would otherwise have condemned. Where a railroad company attempted to condemn the temporary use of land, in order to lay a track to serve during the construction of the main line, they were restrained on the ground that, as the power to condemn had been granted for a railroad, a permanent occupation was intended.⁶ But where it is intended that a corporation shall take the fee of land required for the undertaking, and the statute authorizes the taking of materials, it is not meant that the fee shall be taken in the latter case, as the temporary use of land will satisfy the

¹ *Sweet v. Buffalo, N. Y. & P. R.*, 79 N. Y. 293; *Malone v. Toledo*, 34 Ohio St. 541. ⁴ See *Illinois Cent. R. v. Chicago*, 138 Ill. 453.

² *Thompson's Case*, 57 Hun, 419. ⁵ *Roanoke v. Berkowitz*, 80 Va. 616.

³ *Worcester Gas Light Co. v. County Comm.*, 138 Mass. 289. See also *Taylor v. Baltimore*, 45 Md. 576. ⁶ *Currier v. Marietta & C. R.*, 11 Ohio St. 238.

needs of the work.¹ If an aqueduct corporation is authorized to condemn "lands" for a water supply, it may not elect to condemn, and pay for, the use of water in a stream and leave the bed in the owner.² Where an aqueduct corporation is authorized to fully appropriate a stream, it must pay compensation as for a complete appropriation. It cannot show that at the date of assessment the landowner enjoys as full a use of the water as before, for the use is permissive only, and may be stopped at any time.³ In *De Camp v. Hibernia Railroad Co.*,⁴ the defendants were authorized to take "lands" for the right of way of an underground mine railroad. The route traversed a valuable ore bed. In order to avoid paying for this ore, or a part of it, the company sought to condemn the right to lay the track upon the bed, subject to removal upon the owner giving notice of his intention to mine; in that event, the track was to be laid upon cross-beams thrust into the side-walls of the tunnel, or upon a roadbed to be excavated in the wall. It was held that this was an attempt to condemn, not the easement contemplated by the statute, — a right to exclusive use and occupation, but an interest in common with the landowner, and, further, a future contingent interest in two distinct portions of land. Where a corporation is required to take land in fee simple, an easement may not be condemned in order to reduce compensation.⁵ Thus, where a corporation is authorized to acquire land in fee for the purpose of conducting water, it cannot elect to make compensation for an easement for an underground pipe, but must pay for what is really taken, — an exclusive right to use the land to conduct water by any means.⁶ Where compensation is prescribed "for such actual damage only as will be sustained by entering upon the land, and constructing such drain," compensation must be paid for a perpetual easement, that being the interest necessary to support the use.⁷ Trustees, condemning part of a tract of land for a road and warehouses, cannot bind themselves not to

¹ *Jerome v. Ross*, 7 Johns. Ch. 315.

⁵ *Hill v. Mohawk & H. R.*, 7 N. Y.

² *Watson v. Acquackanonck Co.*, 36 N. J. L. 195.

152.

³ *Miller v. Windsor Water Co.*, 148 Pa. 429.

⁶ *Water Comm. of Amsterdam*, 96 N. Y. 351. See *Taylor v. Baltimore*, 45 Md. 576.

⁴ 47 N. J. L. 43, 518.

⁷ *Chronic v. Pugh*, 136 Ill. 539.

injuriously affect the remainder by making improvements on the part taken.¹

§ 204. **The Interest must be sufficient to Support the Public Use.** — Unless the statute is mandatory the expropriators should take, and can be compelled to pay for, only such an interest as is necessary to support the public use. Whether that interest be complete or partial, temporary or permanent, the owner cannot complain as long as he is compensated for the injury actually sustained.² Agreeably to this principle, the expropriators may, in certain cases, release to the landowner certain rights not essential to the maintenance of the undertaking. Thus, it has been held that, although the condemnation of a surface interest in land carries with it a right to the support of the subjacent soil, the expropriators may release this right, and thus avoid paying for it, where it is without practical benefit, as may be the case where a pipe line is laid over a coal mine.³

It has been held that the expropriators may also decrease their responsibilities, by reserving to the landowner certain valuable rights the existence of which will not prejudice the undertaking.⁴ Thus, in a recent case in Massachusetts, a town was authorized to take by "purchase, or otherwise, water rights, and land for reservoirs." The town took parts of certain tracts bounding on a pond, and reserved to the owners a right of way to the shore for the watering of stock, the cutting of ice, etc. A claim for reduction of compensation on account of this easement was resisted on the ground that the town had no right to reserve it. The court admitted that the reservation vested a new estate in the landowner without his consent, but justified it on the broad ground that it is not necessary to condemn the whole estate in land, if a valuable privilege can be safely secured to the owner.⁵

¹ *Ayr Harbour Trustees v. Oswald*, 8 App. Cas. 623.

² *Penn Coal Co. v. Versailles Gas Co.*, 131 Pa. 522; *McGregor v. Equitable Gas Co.*, 139 Pa. 230.

³ *Sixth Ave. R. v. Kerr*, 72 N. Y. 330; *Hartford & C. R.*, 65 How. Pr. 133; *Taylor v. Baltimore*, 45 Md. 576. See § 233.

⁴ See *Windsor v. Field*, 1 Conn. 279; *Hunsicker v. Briscoe*, 12 La. An. 169.

⁵ *Tyler v. Hudson*, 147 Mass. 609.

Acquisition of a Fee.

§ 205. In the absence of constitutional restriction the legislature may authorize the taking of a fee,¹ and this is so, although the purpose in view may be accomplished by the taking of a smaller estate.² Where the words "fee," or "fee simple," appear in the statute the intention of the legislature is plainly expressed.³ But the acquisition of an estate larger than an easement has been permitted under less explicit statutory directions. For example, when it is said that "the estate, right, property, and interest in the premises shall immediately vest in the company to be held as long as they shall be used for the purposes of said canal;"⁴ that the land condemned shall "vest forever" in the corporation;⁵ that "title to all land so taken shall vest in said city."⁶ On the other hand, the right to take a fee has been denied on account of the insufficiency of the statutory provisions; for example, that a corporation shall be "seized and possessed of the land;"⁷ that it may "take and hold" land;⁸ that compensation shall be assessed for the "value of the land."⁹

Where the state itself is the actor in condemnation proceedings the acquisition of a fee has been presumed.¹⁰

It has been intimated, that a test of the quantum of interest acquired is the nature of the use for which the land is condemned; for example, land taken for a park is presumably taken in fee, as an estate of less dignity will not properly support the use.¹¹ With much less reason, and in opposition to the weight of

¹ *Roanoke v. Berkowitz*, 80 Va. 616; *Patterson v. Boom Co.*, 3 Dill. C. C. 465. See *Scott v. St. Paul & C. R.*, 21 Minn. 322; *Harback v. Boston*, 10 Cush. 295.

² *Water Comm. v. Lawrence*, 3 Edw. Ch. 552; *Sweet v. Buffalo*, N. Y. & P. R., 79 N. Y. 293; *Eldridge v. Binghamton*, 120 N. Y. 309; *Dingley v. Boston*, 100 Mass. 544.

³ *Water Comm. v. Amsterdam*, 96 N. Y. 351.

⁴ *Barnett v. Johnson*, 15 N. J. Eq. 481.

⁵ *Brooklyn Park Comm. v. Armstrong*, 45 N. Y. 234.

⁶ *Page v. O'Toole*, 144 Mass. 303.

⁷ *Quimby v. Vt. Cent. R.*, 23 Vt. 387.

⁸ *Harback v. Boston*, 10 Cush. 295. See also *Pittsburgh & L. E. R. v. Bruce*, 102 Pa. 23.

⁹ *Washington Cemetery v. Prospect Park & C. L. R.*, 68 N. Y. 591. See *Beal v. New York Cent. & H. R. R.*, 41 Hun, 172.

¹⁰ *Haldeman v. Pennsylvania R.*, 50 Pa. 425; *Craig v. Allegheny*, 53 Pa. 477.

¹¹ *Holt v. Somerville*, 127 Mass. 408. See *Brooklyn Park Comm. v. Armstrong*, 45 N. Y. 234.

authority,¹ it has been said that a railroad company having a perpetual charter must necessarily condemn a fee,² and that a canal company is in like case.³ The better opinion is that the purpose does not indicate the estate taken, but simply defines the use to which the land is held.⁴

The interest acquired may be determined by the character of the property condemned. Thus, a statute authorizing the condemnation of land for a boulevard may seem to contemplate the acquisition of a fee, yet where the way is laid across a railroad such an interest only can be acquired as will comport with the railroad use.⁵

§ 206. Assuming that the legislature authorizes the taking of a fee, the question arises whether the fee is absolute or conditional. The power of free alienation is the hall-mark of a fee simple absolute. In some cases this power has been held to inhere in the estate taken. Thus, land condemned by the state in fee may be sold when its use for the particular purpose is no longer expedient.⁶ So, the state may authorize a political corporation to sell lands the fee of which has been condemned. Thus, a city may lawfully sell, when no longer necessary, property condemned and used for an almshouse,⁷ and also land condemned for a park, but found to be in excess of the requirements thereof.⁸ The most extreme instance of the taking of a fee is when a city is empowered to condemn land for the purposes of reclamation and sale.⁹ Where land is condemned in fee by the public authorities for a use, in the maintenance of which private persons have a legal interest, the fee may be in some sense conditional, although the réversionary interest is so remote as to be

¹ See § 207.

² *New Orleans Pacific R. v. Gay*, 31 La. An. 430. But see s. c. 32 La. An. 471. *Ohio St.* 541; *Wyoming Coal Co. v. Price*, 81 Pa. 156. See also *Water Works Co. v. Burkhart*, 41 Ind. 364; *Birdsall v. Cary*, 66 How. Pr. 358.

³ See *New Orleans Pacific R. v. Gay*, 32 La. An. 471. ⁷ *Heyward v. New York*, 8 Barb. 486; s. c. 7 N. Y. 314; *De Varaigne v. Fox*, 2 Blatch. 95.

⁴ See *Sweet v. Buffalo, N. Y. & P. R.*, 79 N. Y. 293. ⁸ *Brooklyn Park Comm. v. Armstrong*, 45 N. Y. 234; *Matter of Rochester*, 137 N. Y. 243.

⁵ *Comm. v. Michigan Cent. R.*, 90 Mich. 385. ⁹ *Dingley v. Boston*, 100 Mass. 544.

⁶ *Mason v. Lake Erie, E. & S. R.*, 1 Fed. Rep. 712; *Malone v. Toledo*, 34

valueless. The fee of a street has been placed in this category.¹ There is no real objection to the taking of an absolute fee by the state or its political corporations. True, the sale of land thus condemned may effect a circuitous transfer of private property to private use, but, as the purchase-money is received by the public, the transaction may be viewed as a mere transmutation of public property.

Where a private corporation is the actor the taking of an absolute fee should never be presumed. Although the taking of such an estate can be authorized,² there are opinions in which an estate in fee simple is conditioned by the purpose for which the land is taken.³ So, under the Lands Clauses Act the promoters take a fee for the purposes of the undertaking only.⁴ But the Lands Clauses Act thus provides in regard to land condemned in good faith, and found to be in excess of the needs of the corporation. Such superfluous land must be sold within ten years from the time limited for the completion of the works. If not sold it vests in the owner of the adjoining land.⁵ But, unless the land in question is urban land or is used for building purposes, the offer to sell must be first made to the person from whose tract it was severed, and next to the owners of adjoining land.⁶ In case the promoters and preferred parties cannot agree upon the price, the purchase-money shall be fixed by arbitration.⁷ The acquisition of a conditional fee is sometimes definitely prescribed, as where the statute declares that the "estate, right, property, and interest in the premises shall immediately vest in the company to be held as long as they shall be used for the purposes of said canal."⁸ The forcible acquisition of an absolute fee by a private corporation seems contrary to the spirit of the eminent domain, although its authorization is probably within the competency of the legis-

¹ See § 397.

⁵ Sect. 127.

² *Patterson v. Boom Co.*, 3 Dill. C. C. 465. See also *Heard v. Brooklyn*, 60 N. Y. 242.

⁶ Sect. 128.

⁷ Sect. 130.

³ *Kellogg v. Malin*, 50 Mo. 496. But see *Challis v. Atchison, T. & S. F. R.*, 16 Kan. 117.

⁸ *Barnett v. Johnson*, 15 N. J. Eq. 481. See also *Sweet v. Buffalo & N. Y. P. R.*, 79 N. Y. 293; *School District v. Norton*, 2 Gray, 414; *Logansport v. Shirk*, 88 Ind. 563.

⁴ *Bostock v. North Staffordshire R.*, 4 E. & B. 798; *Mulliner v. Midland R.*, 11 Ch. D. 611.

lature. A sale of property thus acquired would leave both property and proceeds wholly private. Moreover, the possibility of the diversion of property to private use might be the concealed reason for its condemnation.

Estate less than a Fee.

§ 207. The interest in land usually acquired by condemnation is a right of possession as broad as the needs, as lasting as the life of the public use. This is commonly called an easement, whether or not the occupation is exclusive.¹ But the broader and better view to take of an exclusive, and presumably, perpetual, interest in land is that, if an easement, it is so only in a highly technical sense, and has little in common with that limited interest in the land of another which the term usually denotes.² Indeed, it is insisted in a late case, that a railroad corporation which has condemned the exclusive use of land for a right of way acquires a possessory interest, and not a mere easement, for the relation of dominant and servient tenement does not exist.³

§ 208. As a rule, the public use is of indefinite, continuous, and presumably perpetual duration, and therefore impresses upon the land an interest of the same quality. Yet the use may be temporary, definite, or intermittent. Thus, it seems that land may be condemned for a three days' annual encampment of militia,⁴ and that a road may be laid out for use during the winter season.⁵ The duration of the public interest may be so limited as to

¹ United States v. Harris, 1 Sumn. 110; Pennsylvania S. V. R. v. Reading C. C. 20; New Jersey Zinc, etc. Co. v. Paper Mills, 149 Pa. 18. See also Van-Morris Canal Co., 44 N. J. Eq. 398; *dermullen v. Vandermulen*, 108 N. Y. 195; *Miner v. New York Cent. & H. R. R.*, 123 N. Y. 242; *Robbins v. St. Paul, S. & T. F. R.*, 22 Minn. 286; *Fitch v. New York, P. & B. Co.*, 59 Conn. 414.

v. Beckwith, 10 Kan. 603; *Kane v. Baltimore*, 15 Md. 240; *Heyneman v. Blake*, 53 N. J. L. 1.

19 Cal. 579; *Quick v. Taylor*, 113 Ind. 540; *Sixth Ave. R. v. Kerr*, 72 N. Y. 330.

² *Bemis v. Springfield*, 122 Mass. 330. ³ *New York, S. & W. R. v. Trimmer*, 53 N. J. L. 1. ⁴ See *Brigham v. Edmands*, 7 Gray, 359. ⁵ *Brock v. Barnet*, 57 Vt. 172. See *Holcomb v. Moore*, 4 Allen, 529.

create what is practically an estate for years.¹ The legislature may authorize a temporary occupation of land, in order to facilitate the construction of the undertaking,² and for the purpose of obtaining materials.³ Authority to obtain materials does not permit the acquisition of an interest in the land itself.⁴ The right to take materials from land condemned for other uses does not include the right to take land for the sake of obtaining materials.⁵

RIGHTS OF ENJOYMENT IN THE PROPERTY TAKEN.

§ 209. Where a corporation becomes lawfully possessed of property, the question arises as to what uses it may make of it without further liability. It may offend against the state, by violating the conditions upon which its powers were granted.⁶ It may injure the land of other proprietors, by the construction of the works.⁷ But the question of present interest is, what uses can it make of the property, without trenching on the rights of the person from whom it was taken? What rights of enjoyment have been paid for in paying over the assessed compensation?⁸ Now it is plain that if an absolute fee has been condemned the question is not pertinent, for the owner has been deprived of every vestige of interest. It seems also that such a conditional fee may be acquired as will preclude the original owner from asserting any interest in the property during the continuance of the public estate.⁹ But as a rule, where the estate is less than an absolute fee, the fee remains in him whose land has been condemned. His interest will permit such private uses of the land as do not derogate from the public use,¹⁰ and will give the right to repossession upon the cessation of the use.¹¹

§ 210. The corporation may freely construct and maintain such works as are necessary for the accomplishment of the

¹ *Tait's Ex'r v. Central Lunatic Asylum*, 84 Va. 271.

² *Lauderbrun v. Duffy*, 2 Pa. 398.

³ See § 77.

⁴ *Richmond, F. & P. R. v. Knopffs*, 86 Va. 981.

⁵ *Parsons v. Howe*, 41 Me. 218.

⁶ See § 367.

⁷ See §§ 137 *et seq.*

⁸ See §§ 163, 164.

⁹ See *Barnett v. Johnson*, 15 N. J.

Eq. 481.

¹⁰ See § 215.

¹¹ See § 221.

purpose for which the property was condemned,¹ but not works which cannot be described as necessary,² or which impose an additional burden on the fee.³ It has been held, that the easement acquired by a turnpike company is sufficiently broad to enable them to erect a toll-house on the pike without further compensation.⁴ A railroad company may set up a telegraph line along the right of way for their own use without further compensation to the owner of the fee.⁵ Where it is permitted to lay one way over another⁶ there is but the bare right to cross. Hence, a railroad company laying their road over a highway may not use their statutory width of way by placing a building on the highway,⁷ but a private way is not within the purview of a statute prohibiting the obstruction of roads.⁸

§ 211. In some cases, the natural resources of the land taken may be exploited in order to further the public use. Thus, earth and stone may be used for construction and repair.⁹ But it has been held that where a turnpike company are permitted to occupy a highway, they do not succeed to the right of the public authorities to remove materials.¹⁰ Where the right to minerals found upon the land remains in the owner, the corporation cannot extract valuable clay for its use, and substitute earth of an inferior quality.¹¹

It has been held that where a railroad corporation condemns timber-land for a right of way, it takes, and pays for, all the timber which may be used in the construction of the road, but

¹ See §§ 129, 163

² See *Lance's Appeal*, 55 Pa. 16.

³ See § 162.

⁴ *Ridge Turnpike v. Stoevers*, 6 W. & S. 378; *Ward v. Marietta & N. Turnpike*, 6 Ohio St. 15; *Tucker v. Tower*, 9 Pick. 109. See *Danville, etc. Road v. Campbell*, 87 Ind. 57. But see *Perkins v. Moorestown & C. Turnpike*, 48 N. J. Eq. 499.

⁵ *Western Union Tel. Co. v. Rich*, 19 Kan. 517. See also *Taggart v. Newport St. Ry.*, 16 R. I. 668; *Am. Tel. Co. v. Pearce*, 71 Md. 535.

⁶ See § 179.

⁷ *State v. Vt. Cent. R.*, 27 Vt. 103. See also *Gahagan v. Boston & L. R.*, 1 Allen, 187.

⁸ *Boston Gas Light Co. v. Old Colony & N. R.*, 14 Allen, 444.

⁹ *Aldrich v. Drury*, 8 R. I. 554; *Henry v. Dubuque & P. R.*, 2 Iowa, 288; *Earlywine v. Topeka, S. & W. R.*, 43 Kan. 746. See *Vermilya v. Chicago, M. & S. P. R.*, 66 Iowa, 606.

¹⁰ *Turner v. Rising Sun Turnpike*, 71 Ind. 547.

¹¹ *Loosemore v. Tiverton & N. D. R.*, 22 Ch. D. 25. See also *Robert v. Sadler*, 104 N. Y. 229.

has no right to make any other disposition of it.¹ If trees upon a railroad right of way obstruct the view of the track, they may be cut down in the interest of public safety.² It is not essential that the materials taken shall be used on the tract where they are found. They may be used on any part of the undertaking. Thus, where two islands are condemned for sewerage works gravel may be taken from one for use on the other.³ The highway system under the control of a municipal corporation has been viewed as a single work in this, that materials taken from a given point may be used on any part of the system.⁴ With regard to the quantity of materials, it seems just that, where the interest acquired is no greater than a surface easement, only such materials should be appropriated as are necessarily severed in preparing the ground for the construction of the work.⁵

Materials cannot be taken except for construction and repair. Hence, a railroad company cannot cut timber from the right of way for fuel,⁶ nor extract minerals for their own benefit.⁷ So, a corporation cannot appropriate grass growing on the right of way,⁸ nor ice formed within its limits.⁹ The custodians of a highway cannot authorize the public to use a stream crossing the way,¹⁰ nor can they divert a spring from one side of the road to the other.¹¹

§ 212. Where improvements on land condemned are not to be removed by the owner, but are to be valued as they stand,¹² they belong, of course, to the corporation, which can dispose of them at pleasure.¹³ Where the value of buildings enters into the

¹ *Taylor v. New York & L. B. R.*, 38 N. J. L. 28. See also *Lancaster v. Richardson*, 4 Lans. 136; *Henry v. Dubuque & P. R.*, 2 Iowa, 288. See *Blake v. Rich*, 34 N. H. 282.

² *Brainard v. Clapp*, 10 Cush. 6. See also *Toledo, W. & W. R. v. Green*, 67 Ill. 199.

³ *Titus v. Boston*, 149 Mass. 164.

⁴ *Denniston v. Clark*, 125 Mass. 216; *Huston v. Ft. Atkinson*, 56 Wis. 350; *New Haven v. Sargent*, 38 Conn. 50; *Griswold v. Bay City*, 35 Mich. 452.

See *Macon v. Hill*, 58 Ga. 595; *Elliott, Roads and Streets*, 524.

⁵ *Robert v. Sadler*, 104 N. Y. 229.

⁶ *Preston v. Dubuque & P. R.*, 11 Iowa, 15.

⁷ *Lyon v. Gormley*, 53 Pa. 261. See *Evans v. Haefner*, 29 Mo. 141.

⁸ *Bailey v. Sweeney*, 64 N. H. 296; *Adams v. Emerson*, 6 Pick. 57.

⁹ *Julien v. Woodsmall*, 82 Ind. 568.

¹⁰ *Old Town v. Dooley*, 81 Ill. 255.

¹¹ *Suffield v. Hathaway*, 44 Conn. 521.

¹² See § 238.

¹³ *Finn v. Providence Gas Co.*, 99

compensation assessed, and the buildings are destroyed in order to clear the ground for the construction of the public work, the removal of the debris by the owner should be followed by the deduction of its value from the compensation.¹ But where the owner agrees to take the materials of buildings destroyed, and compensation is assessed with reference to this condition, the expropriators cannot convert the materials to their own use.² Where a part of a building is condemned, the authorities cannot assume control over the part remaining.³

§ 213. *Grants of Property condemned or Interests therein.* — Where the estate taken is less than an absolute fee the property cannot of course be sold. But it may, in some cases, be leased for the use for which it was condemned,⁴ or dedicated⁵ to another use.

Can interests or privileges in the property condemned be granted to third parties? As a rule, such a power cannot be sustained, for it would open the way to a diversion of the property from the purpose for which it was condemned.⁶ Hence, a railroad company cannot lease such property to an ordinary business concern,⁷ nor can they grant to a telegraph company an exclusive right to build along the right of way.⁸ A canal company cannot claim a prescriptive right to water from another canal, for there can be no presumption of a grant where the power to grant never existed.⁹

§ 214. The rule against foreign uses of property condemned should not be pressed so far as to inhibit all incidental uses of property which has been condemned in good faith. There may

Pa. 631; *Mississippi Bridge v. Ring*, 58 Mo. 491. See also *State v. Graves*, 19 Md. 351; *Chicago, I. & K. R. Knuffke*, 36 Kan. 367.

¹ *Lafayette, B. & M. R. v. Winslow*, 66 Ill. 219.

² *Schuchardt v. New York*, 53 N. Y. 202.

³ *Bennett v. Boyle*, 40 Barb. 551.

⁴ See § 108.

⁵ See § 130.

⁶ *Belcher Sugar Refining Co. v. St. Louis Elevator Co.*, 82 Mo. 121.

⁷ *Proprietors of Locks, etc. v. Nashua & L. R.*, 104 Mass. 1; *Lyon v. McDonald*, 78 Tex. 71. See also *Barker v. Hartman Steel Co.*, 129 Pa. 551.

⁸ *Southwestern R. v. Southern & A. Tel. Co.*, 46 Ga. 43; *West. Union Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160. See also *Pacific Postal Tel. Co. v. West. Union Tel. Co.*, 50 Fed. Rep. 493.

⁹ *Staffordshire & W. Canal v. Birmingham & C. Canal*, L. R. 1 H. L. 254. See also *Burbank v. Fay*, 65 N. Y. 57.

be uses which in nowise affect the integrity of the public use, or impose an additional burden on the fee.¹ Thus, it is not necessarily unlawful to permit the use of a part of a railroad station for a hotel or boarding-house,² to allow a station agent to carry on business in the station, in lieu of wages,³ or to lease a part of a market-house not needed for market purposes.⁴

The incidental uses mentioned may minister in greater or less degree to the patrons of the undertaking, but this factor is not essential. In some cases a corporation may make an incidental use for its own profit, especially where the only alternative of a profitable use is the waste of the property in question. Thus where a corporation has condemned land, and the value of the structures is included in the compensation,⁵ they may be sold.⁶ And it has been held that timber cut from land taken for a turnpike may be freely sold.⁷ A corporation may profit by the rental value of the buildings on the land condemned, during the reasonable interim between entry and construction.⁸

Where the proper construction of a public work creates a valuable property, the whole of which is not needed, there is no objection to the disposal of the surplus. Thus, if by the construction of a canal, or river improvement works, more water is impounded than is needed for the purpose in view, the surplus may be leased for manufacturing or other uses.⁹ Where a city lawfully condemns a water supply for present and future wants, it may contract for the disposal of the surplus.¹⁰ An aqueduct company, organized to supply a town with water, may contract to supply certain persons whose lands have been condemned, without necessarily derogating from the purpose of incorpora-

¹ See *Grand Trunk R. v. Richardson*, 91 U. S. 454.

² *Peirce v. Boston & L. R.*, 141 Mass. 481; *Hamilton v. Annapolis & E. R. R.*, 1 Md. Ch. 107. See *Southard v. Cent. R.*, 26 N. J. L. 13.

³ *Hoggatt v. Vicksburg, S. & P. R.*, 34 La. An. 624.

⁴ See *Spaulding v. Lowell*, 23 Pick. 71.

⁵ See § 238.

⁶ See *Forney v. Fremont, E & M. R.*, 23 Neb. 465.

⁷ *Prather v. Ellison*, 10 Ohio, 396. See § 211.

⁸ *Ross v. Pennsylvania R.*, 17 Phila. 339. See also *Curran v. Louisville*, 83 Ky. 628.

⁹ *Kaukanna Water Power Co. v. Green Bay & M. Canal*, 142 U. S. 254; *Jessup v. Loucks*, 55 Pa. 350. But see *Barre Water Works*, 62 Vt. 27. See § 221.

¹⁰ *Slingerland v. Newark*, 54 N. J. L. 62. See also *State v. Eau Claire*, 40 Wis. 533.

tion.¹ The New Hampshire Mill Act permits the leasing of surplus water to other mills.²

Rights of the Owner of the Fee.

§ 215. Where the estate taken is less than a fee the owner of the fee may enjoy such rights in the property as do not derogate from the public use.³ Where the public interest in land is a surface easement, the owner of the fee may make any use of the subsoil which will not impair the utility of the undertaking. Minerals may be extracted if sufficient support is left,⁴ though, of course, the entrance to the workings must be made on private property. Under the Railway Clauses Act, the company may take mines the working of which may be detrimental to the undertaking; but if purchase be not made within a prescribed period, the mine-owner may work his mine subject only to liability for actual injury.⁵ The owner of the fee may lay pipes under a railroad,⁶ and lead a watercourse under a highway.⁷

The extent to which the owner of the fee may make use of the surface of land impressed with a public use, depends wholly upon the nature of the possession — having regard to the question of exclusiveness — requisite to the maintenance of the undertaking. Where land is flooded by the erection of a mill-dam, the owner may make such use of the water as will not lessen the mill power,⁸ — may cut ice,⁹ and construct a log boom.¹⁰ But he cannot reclaim the land, if this will diminish the reservoir.¹¹ Materials not needed for construction and repair belong to the

¹ *Pocantico Water Works v. Bird*, 130 N. Y. 249. See also *Pasadena v. Stimson*, 91 Cal. 238.

² *Amoskeag Co. v. Worcester*, 60 N. H. 522.

³ *United States v. Harris*, 1 Sumn. C. C. 20; *Tucker v. Tower*, 9 Pick. 109; *Jackson v. Hathaway*, 15 Johns. 447; *Kane v. Baltimore*, 15 Md. 240; *New Jersey Zinc Co. v. Morris Canal*, 44 N. J. Eq. 398.

⁴ See *Penn Coal Co. v. Versailles Gas Co.*, 131 Pa. 522; *Hollingsworth v. Des Moines & S. L. R.*, 63 Iowa, 443.

⁵ Sections § 77 *et seq.*

⁶ *Hasson v. Oil Creek & A. R.*, 8 Phila. 556.

⁷ *Perley v. Chandler*, 6 Mass. 454; *Woodring v. Forks Township*, 28 Pa. 355.

⁸ *Paine v. Woods*, 108 Mass. 160

⁹ *Paine v. Woods*, 108 Mass. 160; *Brookville & M. H. Co. v. Butler*, 91 Ind. 134.

¹⁰ *Jordan v. Woodward*, 40 Me. 317.

¹¹ *Boston & R. Mill Corp. v. New man*, 12 Pick. 467.

owner of the fee,¹ but he cannot, of course, sever them in such a manner as will interfere with the public use. The possession required by a railroad right of way is quite exclusive.² Hence, where a railroad divides a tract of land it cannot be crossed at the will of the owner. The right to cross, if it exists at all, must be based on statute or agreement,³ and cannot be exercised in such a manner as to increase the risk of accident on the road.⁴ It has been held that the owner of the fee cannot cut herbage from a railroad right of way.⁵ The interest acquired by a city in land condemned for a pumping-station is so exclusive that the entry of the owner of the fee is a trespass.⁶

Where land is condemned in fee, the person from whom it is taken is divested of all rights in it, and this though the particular right asserted would not affect the utility of the public use. Thus, where a canal company have taken the fee, the former owner cannot cut ice.⁷

ABANDONMENT.

§ 216. Where the interest condemned is less than an absolute fee, it is terminated by the abandonment of the public use, either as a whole, or in respect to the particular location. Abandonment may take place before the completion, or even the commencement, of the undertaking, or after its completion. The only distinction between these cases is that in the former the interest of the public is not so positive. The discontinuance of proceedings to condemn⁸ should be sharply distinguished from an abandonment in this, that one is predicated upon the in-execution of a taking, the other upon its execution. The abandonment of a public use may effect two results, a loss to the public

¹ *Winter v. Petersen*, 24 N. J. L. Holton, 32 Vt. 43; *New York & N. E.* 524; *Makepeace v. Worden*, 1 N. H. 16; *R. v. Comstock*, 60 Conn. 200. But see *Phifer v. Cox*, 21 Ohio St. 248; *Rich v. Kansas City & E. R. v. Kregelo*, 32 Minn. 423; *Higgins v. Kan.* 608; *Mississippi, T. & L. B. R. v. Reynolds*, 31 N. Y. 151; *Cole v. Drew, Wooten*, 36 La. An. 441.

⁴ *Chalcraft v. Louisville, E. & S. L. R.*, 113 Ill. 86.

⁵ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Chicago, S. & C. R. v. McGrew*, 104 Mo. 282; *St. Onge v. Day*, 11 Col. 368.

⁶ *Reading v. Davis*, 153 Pa. 569.

⁷ *Waterworks Co. v. Burkhart*, 41 Ind. 364.

⁸ *Presbrey v. Old Colony & N. R.*, 103 Mass. 1; *Connecticut & P. R. R. v.*

⁸ See § 196.

through the lapse of one of its agencies, — a loss in many cases nominal, — a gain to certain persons, in that the land which has supported the use reverts to the owner.

Abandonment is a final act, not an experimental or revocable one. Hence, it has been held that a highway cannot be discontinued, and the right reserved to reopen it without compensation. The discontinuance is complete, the reservation ineffective.¹ Where a canal corporation has abandoned its undertaking, neither it, nor its assigns, can free the land from a claim based on adverse possession, by asserting that it is devoted to public use.² If the acts of a corporation show an abandonment of property, the successors of the corporation cannot assert a right to the property on the ground that the abandonment does not appear of record.³

§ 217. **The Right to Abandon.** — Where one undertakes a private business he may wind it up at pleasure, and, saving the rights of creditors, may freely dispose of its assets. But it may be said broadly that, except perhaps in the rather anomalous cases of private roads and mill-dams, works of such public interest as to warrant the condemnation of property for their promotion will not be considered as abandoned, unless the consent of the public is expressed by definite action, or implied by acquiescence in continued nonuser.⁴ Thus, a city cannot vacate a street without legislative authority.⁵ A railroad corporation cannot abandon arbitrarily the services which it was incorporated to perform.⁶

It follows from what has been written, that, as a rule, outside parties have no such power over or interest in public works as will enable them to effect or prevent an abandonment. An encroachment upon a highway does not effect the abandonment of the part affected.⁷ One whose land is crossed by a railroad cannot compel its operation because it facilitates the marketing of his minerals.⁸

¹ *Cheshire Turnpike Co. v. Stevens*, 10 N. H. 133.

² *Collett v. Comm.*, 119 Ind. 27.

³ *Westcott v. New York & N. E. R.*, 152 Mass. 465.

⁴ See *People v. Albany & V. R.*, 24 N. Y. 261; *King v. Severn & W. R.*, 2 B. & A. 646.

⁵ See § 397.

⁶ *State v. Hartford & N. H. R.*, 29 Conn. 538; *Atty.-Gen. v. Erie & K. R.*, 55 Mich. 15. See *Commonwealth v. Fitchburg R.*, 12 Gray, 180.

⁷ *Horey v. Haverstraw*, 47 Hun. 356.

⁸ *Reg. v. Gt. West. R.*, 9 R. 127.

In no case can the grantee of a valuable privilege dependent on the existence of a public undertaking,¹ secure its continuance by compelling the maintenance of the work.² With even less reason can such a grantee assert the power to maintain the undertaking for his own benefit. In *Jessup v. Loucks*,³ the defendant had long enjoyed the use of surplus water created by the works of a corporation. The corporation having ceased to maintain its works, the defendant claimed that he should be substituted for it in order that the grant might be enjoyed. The court repudiated the claim that works, which had ceased to be of public utility, should be maintained for private use, and found that the grant necessarily expired with the cessation of the public use.

§ 218. **What Constitutes an Abandonment.** — Abandonment may be effected by the definite action of the corporation.⁴ Thus, where a new undertaking is to replace an existing one, the completion of the former is the sign of the abandonment of the latter.⁵ But where a railroad company lease a parallel line for a short term of years, and discontinue a section of their own line, with the intention of resuming it on the expiration of the lease, there is not an abandonment.⁶ Where a town condemned an easement for a slope to support a street, it was held that the mere building of a retaining wall was not conclusive evidence of an abandonment of the easement, especially as the wall was not apparently of a permanent character.⁷ A resolve to abandon, not followed by action, will not operate to revest the land in the owner.⁸ Thus, where a town voted to relinquish land condemned for a cemetery, and bought other land, which was found

¹ See § 214.

² *Commonwealth v. Pennsylvania R.*, 51 Pa. 351. See also *Fox v. Cincinnati*, 33 Ohio St. 492; *McCombs v. Stewart*, 40 Ohio St. 647; *Burbank v. Fay*, 65 N. Y. 57; *State v. Graves*, 19 Md. 351. Phillips *v. Dunkirk, W. & P. R.*, 78 Pa. 177. See also *Warner v. Holyoke*, 112 Mass. 362; *Commonwealth v. Boston & A. R.*, 150 Mass. 174; *Stacey v. Vermont Cent. R.*, 27 Vt. 39; *Peoria v. Johnston*, 56 Ill. 45; *Galbraith v. Littleich*, 73 Ill. 209.

³ 55 Pa. 350.

⁴ *Westcott v. New York & N. E. R.*, 152 Mass. 465. See also *Hickox v. Chicago & C. S. R.*, 78 Mich. 615; s. c. 94 Mich. 237. ⁵ *Durfee v. Peoria, D. & E. R.*, 140 Ill. 435.

⁶ *Kuschke v. St. Paul*, 45 Minn. 225. ⁷ See *Munson v. Derby*, 37 Conn. 298.

⁸ *Benham v. Potter*, 52 Conn. 248; 298.

to be unsuited to the purpose, there was no abandonment of the original location.¹

§ 219. Where property is condemned in good faith, the fact that it is not used for the public purpose, or is misused, is not usually a matter of interest, in point of law, to the person from whom it was taken. If nonuser or misuser be an abuse of a franchise, the state may act.²

An abandonment need not be inferred from the fact that the expropriators, after establishing their rights in the property in question, do not actually disturb the possession of the occupant for a long time. Thus, where land is taken for a road, there is not an abandonment, although the way is not actually opened for many years during which the owners retained possession.³ So, where one conveyed land to a railroad company for a right of way, and retained possession of it for thirteen years, during which the company did not construct, it was held that the way was not abandoned.⁴ The fact that the taking of possession is not followed by the actual construction of the work does not necessarily enable the owner to recover possession on the score of abandonment.⁵ Thus, where a city condemned land for a wharf, and did not prosecute the work for twelve years on account of lack of funds, the owner's claim to possession was denied, as the delay was evidence of postponement only.⁶ A statutory provision that land condemned for a school-house shall revert to the owner in case a school-house has ceased to be thereon for two years, does not apply where a school-house has not been built within two years after the appropriation of the land.⁷

In some cases an abandonment through nonuser has been inferred from the fact that the property in question is in the

¹ *Stevens v. Norfolk*, 42 Conn. 377. 29 Iowa, 276. See also *Noll v. Dubuque*,

² *Heard v. Talbot*, 7 Gray, 113; B. & M. R., 32 Iowa, 66.

Proprietors of Locks, etc. v. Nashua & L. R., 104 Mass. 1; *West. Pennsylvania R. R.*, 152 Pa. 488. See also *St. Louis & S. Appeal*, 104 Pa. 399; *Logan v. Vernon*, F. R. v. Foltz, 52 Fed. Rep. 627.

G. & R. R., 90 Ind. 552. ⁶ *Curran v. Louisville*, 83 Ky. 628.

³ See *Reilly v. Racine*, 51 Wis. 526; See also *Ross v. Pennsylvania R.*, 17 Henshaw v. Hunting, 1 Gray, 203; Phila. 339.

Derby v. Alling, 40 Conn. 410. ⁷ *Jordan v. Haskell*, 63 Me. 189.

⁴ *Barlow v. Chicago, R. I. & P. R.*,

adverse possession of private persons,¹ and the same inference has been drawn from mere nonuser for a long period, under circumstances which warrant the conclusion that the desire to maintain the use has ceased.²

Where a corporation unlawfully disposes of surplus land to another corporation of the same sort, the owner may treat the transaction as an abandonment, and recover compensation from the latter.³ But it has been held that where a corporation leases a building not in present use there is not an abandonment.⁴

§ 220. It is plain that there is no abandonment as long as the property is devoted to the original use. We have seen that the personality of public agents may be of slight importance to the state to which they are responsible for the performance of public duties;⁵ it is evidently of no concern to the landowner, who has no legal interest in this performance. Therefore, the use is preserved although the undertaking has passed into the control of new parties, whether the transfer be by contract⁶ or judicial sale.⁷ Even though the transfer is illegal, because made without the consent of the state, the owner cannot repossess himself of the property. He is not prejudiced in fact, for the land is still devoted to the original use; nor in law, for the illegal transfer is an offence against the state.⁸

The life of the use is not measured, necessarily, by the life of the corporation charged with its maintenance. A corporation enjoying its franchise for a limited period may yet acquire an interest in land which will survive the franchise, and continue to support the use under new auspices.⁹ So, the forfeiture of a corporate franchise need not effect the abandonment of the pub-

¹ *Beardslee v. French*, 7 Conn. 125; & L. R., 104 Mass. 1; *Roby v. New York Big Rapids v. Comstock*, 65 Mich. 78; Cent. & H. R. R., 142 N. Y. 176, reversing s. c. 65 Hun, 532. See *Roby v. Yates*, 70 Hun, 35.

² *Jeffersonville, M. & L. R. v. O'Connor*, 37 Ind. 95.

⁵ See § 103.

⁶ See § 108.

³ *Platt v. Pennsylvania Co.*, 43 Ohio St. 228; *Fort Worth & R. G. R. v. Jennings*, 76 Tex. 373. See also *Pennsylvania Co. v. Platt*, 47 Ohio St. 366.

⁷ *McConihay v. Wright*, 121 U. S. 201.

⁸ *Crolley v. Minn. & S. L. R.*, 30 Minn. 541.

⁴ *Proprietors of Locks, etc. v. Nashua*

⁹ *Miner v. New York Cent. & H.*

lic use. It may still be continued by the state,¹ or its newly appointed agent.²

Is continuity of use necessarily broken by the authorized substitution, in whole or in part, of a new undertaking for the original one? The question, be it noted, is not whether some compensation can be claimed on the ground that the new undertaking imposes an additional burden on the fee,³ but whether there is an abandonment, so that the owner is repossessed of his estate, which can be rediusted only on payment of full compensation. Thus, substituting a turnpike for a highway, or *vice versa*, is not an abandonment of the original use,⁴ and this though it has been declared that upon the discontinuance of the turnpike the land should revert to its owners.⁵ It appears that land dedicated for a training-field does not revert to the owner because a highway is laid out over it.⁶ The public estate in a street is not abandoned by the authorized construction of a railroad thereon.⁷ It has been held that the authorized transfer by a canal corporation of its right of way to a railroad company is not an abandonment, because a public way is still preserved,⁸ and, for the same reason, there is no abandonment where a road is substituted for a canal.⁹ It has been held that land condemned for a canal does not revert because the corporation accept and act upon a charter permitting it to use the water for motive power.¹⁰ In other cases, the interest originally acquired has been deemed to be so strictly limited to the specified use, that any attempt to substitute a variation is treated as an abandonment. Thus, it has been held that the removal of tracks by a railroad company,

R. R., 46 Hun, 612; s. c. 123 N. Y. Peirce v. Somersworth, 10 N. H. 369. 242. See also Nicoll v. New York Cent. See § 162.

R., 12 N. Y. 121. See Strong v. Brook- ⁵ Murray v. County Comm., 12 Met. lyn, 68 N. Y. 1. 455.

¹ Erie & N. E. R. v. Casey, 26 Pa. ⁶ Wellington's Petition, 16 Pick. 87. 287. ⁷ Arbenz v. Wheeling & H. R., 33

² Erie & N. E. R. v. Casey, 26 Pa. W. Va. 1. See also Brainard v. Mis- 287. See also Noll v. Dubuque, B. & sisquoi R., 48 Vt. 107.

M. R., 32 Iowa, 66; Morrill v. Wabash, ⁸ Chase v. Sutton Man. Co., 4 Cush. St. L. & P. R., 96 Mo. 174. 152; Hatch v. Cincinnati & I. R., 18

⁹ See § 162. Ohio St. 92.

⁴ State v. Maine, 27 Conn. 641; ⁹ Malone v. Toledo, 28 Ohio St. 643. Chagrin Falls, etc. Co. v. Cane, 2 Ohio ¹⁰ Bass v. Roanoke Nav. Co., 111

St. 419; Tift v. Buffalo, 82 N. Y. 204; N. C. 439.

followed by an attempt to transfer the right of way to a municipal corporation for a highway, is an abandonment of the easement condemned.¹ An easement taken by a canal company has been defined to be for canal purposes only, so that, upon the abandonment of the canal, and the sale of its property to a railroad company, the owner of the fee is repossessed of his whole estate.² In *Logansport v. Shirk*,³ a canal company had acquired what was called the fee of a strip of land formerly used as a street. The company abandoned the canal, and their rights were purchased by the defendant. It was held that upon abandonment the street use revived, and that the defendant took the fee subject to the rights of the public and the abutting owners.⁴

§ 221. *Consequences of Abandonment.* — Where the interest condemned is less than a fee simple absolute, the land reverts to the owner on the abandonment of the public use.⁵ But improvements placed upon the land in furtherance of the public use are, as between the owner and the corporation, like trade fixtures and may be removed.⁶

The abandonment of the undertaking extinguishes all incidental grants, — a grant of surplus water, for example. In the absence of express provision to the contrary, the grantee cannot have compensation for the loss.⁷ A state abandoned a canal, transferred the strip of land to a city for a sewer way, and required the city to compensate those having a present supply of water for mill purposes. It was held that one who had leased a supply, but had not used it for years, because of its insufficiency, — an insufficiency due to lack of repairs which the lessee could not compel the state to make, — was not entitled to com-

¹ *Heard v. Brooklyn*, 60 N. Y. 242; ⁶ *Wagner v. Cleveland & T. R.*, 22 Ohio St. 563. See also *Northern Cent*

² *Pittsburgh & L. E. R. v. Bruce*, 102 Pa. 23. *R. v. Canton Co.*, 30 Md. 347; *Brockhausen v. Bochland*, 137 Ill. 547.

³ 88 Ind. 563.

⁴ See *Taylor v. Chicago, M. & S. P. R.*, 83 Wis. 636. ⁷ *Hubbard v. Toledo*, 21 Ohio St. 379; *Little Miami Elevator Co. v. Cincinnati*, 30 Ohio St. 629; *Commonwealth v. Pennsylvania R.*, 51 Pa. 351.

⁵ *John Street*, 19 Wend. 659; *Helm v. Webster*, 85 Ill. 116; *Hastings v. Burlington & M. R.*, 38 Iowa, 316; *Jessup v. Loucks*, 55 Pa. 350; *McCombs v. Stewart*, 40 Ohio St. 647. See also *Fishback v. Woodruff*, 51 Ind. 102; *Hoagland v. New York, C. & S. L. R.*, 111 Ind. 443.

pensation.¹ But where a canal company were authorized, not only to construct a canal, but also to use the water for mill purposes, these objects were deemed to be so independent that the sale of the canal to a railroad company did not divest the water rights.²

A corporation which has appropriated property cannot escape payment of compensation by abandoning it.³

¹ *Fox v. Cincinnati*, 33 Ohio St. 492; ² *Lake Erie & W. R. v. Griffin*, 107 s. c. 104 U. S. 783. Ind. 464. See also *Reid v. Wall Town-*

³ *Chase v. Sutton Man. Co.*, 4 Cush. ship, 34 N. J. L. 275.
152.

CHAPTER X.

COMPENSATION AND DAMAGES.

§ 222. "Compensation" and "damages" are sometimes used interchangeably to represent the purchase-money paid for rights acquired by the eminent domain. But it is better to let "compensation" stand for purchase-money, and "damages" for indemnity for a trespass.¹ Whatever confusion there may be in the use of terms, the difference between compensation and damages is frequently expressed in the rule that they shall not be ascertained in a single proceeding or suit. Thus, in proceedings to condemn, the tribunal cannot, as a rule, award damages for a trespass.² Nor is it generally proper in a common-law action of trespass to recover compensation for a lawful appropriation.³

COMPENSATION.

§ 223. The word "just," "full," "adequate," "due," or "reasonable," prefixed to "compensation" in constitution or statute, does not carry any definite weight. None of these prefixes can enlarge or restrict the definition of property, nor affect the measure of compensation. Although some stress seems to have been laid upon the word "just,"⁴ a little excursion into the field of comparative jurisprudence will show the futility of defining it. Thus, one might receive payment for the flooding of his land in Maine,⁵ but none in respect to his land in Pennsylvania, according to the late Constitution.⁶ Again, he might be charged with

¹ See *Gilmore v. Pittsburgh, V. & C. R.*, 104 Pa. 275. Wis. 478; *Dolores, etc. Canal v. Hartman*, 17 Col. 138; *Chicago & G. T. R. v. Hough*, 61 Mich. 507.

² See § 352.
³ *Cal'anan v. Port Huron & N. R.*, 61 Mich. 15. See § 309. ⁴ *Lee v. Pembroke Iron Co.*, 57 Me. 481.

⁵ *Bangor & P. R. v. McComb*, 60 Me. 290; *Newman v. Met. El. R.*, 118 N. Y. 618; *Bigelow v. West Wisconsin R.*, 27 W. & S. 101. ⁶ *Monongahela Nav. Co. v. Coons*, 6

benefits on the opening of a street over his land in New York,¹ while for such use of his land in Georgia he would receive compensation regardless of benefits.² In each State, however, he would receive the "just compensation" prescribed by the constitution. Nor does it seem that "ample" adds anything to the meaning of compensation.³ It may be urged that where "just compensation" replaces "compensation" in constitution or statute, the new phrase should receive a new construction. But in our opinion the addition should be treated as merely emphatic. The state may enlarge the normal measure of compensation,⁴ but the courts should not discover such an intention, and give it practical direction, from so slight a verbal addition.⁵ The Constitution of Massachusetts prescribes the payment of a "reasonable" compensation. But a survey of the decisions in this State shows that the property owner is certainly as well protected as in other States.

§ 224. The constitutional requirement is always satisfied by the payment of money, and in some jurisdictions, as will be presently shown, by the payment of money only. So far as the decisions turn on the definition of "money," they agree in excluding everything save the lawful medium of exchange. Thus, it is not a tender of money to offer bonds of the corporation,⁶ interest-bearing certificates,⁷ unpaid acceptances,⁸ canal scrip.⁹ Further, it has been held that a tender of a bond to secure the compensation is not a tender of money.¹⁰ If there is more than one recognized medium of exchange, compensation must be paid in the one according to which the property was valued,¹¹ and, notwithstanding that paper money is a legal tender, a State

¹ *Livingston v. New York*, 8 Wend. 85.

² *Savannah v. Hartridge*, 37 Ga. 113.

³ *Pittsburgh, V. & C. R. v. Rose*, 74 Pa. 362.

⁴ See § 274.

⁵ See also *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

⁶ *Hamilton v. Annapolis & E. R. R.*, 1 Md. Ch. 107.

⁷ *Butler v. Sewer Comm.*, 39 N. J. L. 665.

⁸ *Harness v. Chesapeake Canal*, 1 Md. Ch. 248.

⁹ *State v. Beackmo*, 8 Blackf. 246.

¹⁰ *Covington S. R. Trans. Co. v. Piel*, 87 Ky. 267; *Moody v. Jacksonville, T. & K. W. R.*, 20 Fla. 597; *Vilhac v. Stockton & I. R.*, 53 Cal. 208. See also *Sanborn v. Belden*, 51 Cal. 266. See *Ring v. Mississippi Bridge*, 57 Mo. 496.

¹¹ *North. Pacific R. v. Reynolds*, 50 Cal. 90.

legislature may prescribe that compensation shall be paid in specie.¹ The owner cannot be compelled to accept land in payment of compensation.²

§ 225. The position of benefits³ with respect to compensation is by no means a matter of general agreement. According to one opinion benefits are allowed as compensation. It is held that compensation does not necessarily mean money, but includes any means whereby the owner can be recompensed in fact for the loss of property.⁴ In other decisions, benefits are still viewed as a substitute for money, and are not considered for this reason, as the courts define compensation to be money compensation.⁵ A third opinion is that in estimating benefits there is no ascertainment of compensation itself, but simply an ascertainment of the state of the property in order to get a basis for pecuniary compensation.⁶ Finally, benefits have been allowed as in reduction of money compensation.⁷

The tribunal cannot decrease money compensation by ordering the promoters to do a certain thing for the benefit of the owner,⁸ unless this is acceptable to both parties.⁹ Hence, one whose land is taken for a railroad cannot be compelled to accept a sum of money, and a wagon bridge to be built by the corporation.¹⁰

¹ *Arnold v. Covington & C. Bridge*, 1 Duv. 372.

² *Van Horne's Lessee v. Dorrance*, 2 Dall. 304; *Commonwealth v. Peters*, 2 Mass. 125. See also *Chicago, S. & C. R. v. McGrew*, 104 Mo. 282; *New York, W. S. & B. R. v. Bell*, 28 Hun, 426. *New York, L. & W. R. v. Miller*, 49 Hun, 539.

³ See §§ 265-273.

⁴ *Daugherty v. Brown*, 91 Mo. 26; *Root's Case*, 77 Pa. 276; *San Francisco, A. & S. R. v. Caldwell*, 31 Cal. 367 (under late constitution); *Ross v. Davis*, 97 Ind. 79; *Rassier v. Grimmer*, 130 Ind. 219.

⁵ *Brown v. Beatty*, 34 Miss. 227; *Natchez, J. & C. R. v. Currie*, 62 Miss. 506. See also *Burlington & C. R. v. Schweikart*, 10 Col. 178.

⁶ *Lowerre v. Newark*, 38 N. J. L. 151;

Butler v. Sewer Comm., 39 N. J. L. 665; *Page v. Chicago, M. & S. P. R.*, 70 Ill. 324; *Symonds v. Cincinnati*, 14 Ohio, 147. See *Carson v. Coleman*, 11 N. J. Eq. 106.

⁷ *Meacham v. Fitchburg R.*, 4 Cush. 291.

⁸ *Chicago, M. & S. R. v. Melville*, 66 Ill. 329; *New Orleans Pacific R. v. Murrell*, 34 La. An. 536; *McArthur v. Kelly*, 5 Ohio, 139; *Burlington & C. R. v. Schweikart*, 10 Col. 178; *Railroad Co. v. Halstead*, 7 W. Va. 301. See also *Hewett v. County Comm.*, 27 Atl. Rep. 179 (Me. 1893).

⁹ *Pennsylvania R. v. Reichert*, 58 Md. 261. See also *Morse, Petitioner*, 18 Pick. 443.

¹⁰ *Toledo, A. A. & N. R. v. Munson*, 57 Mich. 42.

Necessity of Compensation.

§ 226. There are *dicta* which countenance the opinion that compensation is not of the essence of the eminent domain, that the usual constitutional clause is restrictive not declaratory, so that, were it omitted, the state could take property without paying for it.¹ This opinion seems to have led to practical results in but few cases, notably several early South Carolina cases in which it was held that land might be taken for roads without compensation.² In New York an act permitting the taking of unenclosed and uncultivated land for roads, without compensation, has been held unconstitutional.³

In New Jersey and Pennsylvania the right to compensation for lands condemned for roads has been placed upon a statutory, rather than a constitutional, basis. This is so because the original grants of land made by the Proprietors contained extra allowances for roads.⁴ The fact of such allowance has been considered evidence of original compensation,⁵ but Chief Justice Beasley has referred the whole matter to "the ancient *jus publicum*, to seize the property of the citizen without rendering him its value."⁶ The scope of this exceptional law has been limited as straitly as possible. Thus, the land that may be taken without compensation is unimproved land only.⁷ The road for which it may be taken is one not wider than those in common use at the time of the constitutional declaration.⁸ Private roads are not within the law.⁹ It has been said recently, that the legislature of New Jersey has, by providing for compensation, spent its power over the subject, and irrevocably fixed the duty to pay for all land taken for roads.¹⁰

¹ See *Boom Co. v. Patterson*, 98 U. S. 403; *United States v. Jones*, 109 U. S. 513; *Clark v. Saybrook*, 21 Conn. 313; *Wilson v. Baltimore & P. R.*, 5 Del. Ch. 524; *Furman St.*, 17 Wend. 649; *Orr v. Quimby*, 54 N. H. 590, 647. Doe, J. diss. 100 Pa. 362.

² *Lindsay v. Comm.*, 2 Bay, 38; *State v. Dawson*, 3 Hill, 100.

³ *Wallace v. Karlenowefski*, 19 Barb. 118.

⁴ *Simmons v. Passaic*, 42 N. J. L. 619; *Workman v. Mifflin*, 30 Pa. 362; *Wagner v. Salzburg Township*, 132 Pa.

636. N. J. Const. i. 16. "Land may be taken for public highways as heretofore until the legislature shall direct compensation to be made."

⁵ *Township East Union v. Comrey*, 100 Pa. 362.

⁶ *Ward v. Peck*, 49 N. J. L. 42.

⁷ *Highway Case*, 22 N. J. L. 293; *Plank Road v. Thomas*, 20 Pa. 91.

⁸ *Mangles v. Freeholders*, 55 N. J. L. 88.

⁹ *Perrine v. Farr*, 22 N. J. L. 356.

¹⁰ *Cherry v. Keyport*, 52 N. J. L. 544.

§ 227. The view of the civilians, that compensation is essential,¹ has been approved in States where the organic law was, at the date of the decision, silent on the subject, or affirmed the sanctity of private rights only in general terms,² although the mistaken idea that the Fifth Amendment to the Federal Constitution affects the powers of the States,³ seems to have contributed to this opinion in some cases.⁴ The true doctrine is, in the writer's opinion, that which requires the payment of compensation, whether it be expressly enjoined or not. The modern concept of a constitutional state, as realized in the United States, has no room for the spoliation of the individual.

Where the constitution expressly permits condemnation for uses termed private,⁵ and is silent as to compensation, it is due nevertheless on principle.⁶

§ 228. The right to compensation whether it be deemed inherent or constitutional, is not usually considered as founded on contract.⁷ This reason is given: "The obligation to pay an award does not rest on contract, but on necessity imposed by the legislature and arising from constitutional prohibition. The payment or tender of the amount of the award is the performance of a condition precedent, not the execution of a contract."⁸ Hence, the receiver of an insolvent railroad corporation cannot affect a landowner's right to compensation, by ordering that all claims against the corporation shall be presented within a certain time.⁹ But where land is condemned and compensation withheld, the transaction is generally treated as an ordinary pur-

See also *State v. Seymour*, 35 N. J. L. 47. *Nav. Co. v. United States*, 148 U. S. 312; *Hazen v. Essex Co.*, 12 Cush. 475.

¹ Grotius, *War & Peace*, iii. 20-7; Vattel, Chitty's ed. 188.

² See § 35.

³ Street's Council of Revision (N. Y.), 324; *Bristol v. New Chester*, 3 N. H. 524; *Mt. Washington Road*, 35 N. H. 134; *Harness v. Chesapeake Canal*, 1 Md. Ch. 248; *Bonaparte v. Camden & A. R.*, Bald. C. C. 205; *Sinnickson v. Johnson*, 17 N. J. L. 129; *Johnston v. Rankin*, 70 N. C. 550; *Staton v. Norfolk & C. R.*, 111 N. C. 278; *Martin's Case*, 13 Ark. 198. See also *Monongahela*

Ch. 162; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694.

⁵ See § 39.

⁶ *Chronic v. Pugh*, 136 Ill. 539.

⁷ *Garrison v. New York*, 21 Wall. 196; *Lamb v. Schottler*, 54 Cal. 319. See §§ 371, 377, 393.

⁸ *Platt v. Bright*, 31 N. J. Eq. 81.

⁹ *Bloomfield R. v. Van Slike*, 107 Ind. 480.

chase, and the owner holds a lien for the compensation.¹ Where land condemned is mortgaged before payment of compensation, the interest of the mortgagee is subject to the landowner's lien.² Where it is enacted that compensation shall be paid for property damaged or injuriously affected, and a common-law judgment is obtained in respect to such damage, the judgment must be first paid, upon foreclosure of a mortgage of the corporate property.³

A lien in the nature of a vendor's lien seems to have been deemed, in some cases, an insufficient protection to the property owner. It has been enacted that judgment and execution shall follow the assessment of compensation,⁴ and it has been held that there is no reason why execution should not issue, even where the statute is silent, as it can be stayed upon tender of the sum due.⁵

§ 229. **Statutory Provision for Compensation.** — Chancellor Kent seems to have considered the obligation to pay compensation as in some sense self-executing. He questioned whether an entry under a statute, which failed to provide for compensation, should be treated as a trespass, in view of the fact that the defect could be remedied by subsequent legislation.⁶ This view has been repudiated. A statute which does not provide for compensation cannot justify entry. Such a statute has been declared void,⁷ or, because it recognizes the obligation to compensate, but

¹ *Adams v. St. Johnsbury & L. C. R.*, 57 Vt. 240; *Lycoming Gas, &c. Co. v. Moyer*, 99 Pa. 615. See §§ 296, 385.

² *Borough of Easton's Appeal*, 47 Pa. 255; *West. Pennsylvania R. v. Johnston*, 59 Pa. 290; *Mercantile Trust Co. v. Pittsburgh & W. R.*, 29 Fed. Rep. 732.

³ *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35.

⁴ *Drath v. Burlington & M. R.*, 15 Neb. 367. See *Evansville & C. R. v. Miller*, 30 Ind. 209.

⁵ *Peoria & R. I. R. v. Mitchell*, 74 Ill. 394. But see *Derby v. Gage*, 60 Mich. 1.

⁶ *Rogers v. Bradshaw*, 20 Johns. 735. See also *Rugheimer's Case*, 36 Fed. Rep. 369; *Jerome v. Ross*, 7 Johns. Ch. 315.

⁷ *Thacher v. Dartmouth Bridge*, 18 Pick. 501; *Connecticut River R. v. County Comm.*, 127 Mass. 50; *Neponset Meadow Co. v. Tileston*, 133 Mass. 189; *Bloodgood v. Mohawk & H. R.*, 18 Wend. 9; *People v. Hayden*, 6 Hill, 359; *Morgan v. King*, 35 N. Y. 454; *People v. Loew*, 102 N. Y. 471; *Sherman v. Milwaukee, L. S. & W. R.*, 40 Wis. 645; *Foot v. Cincinnati*, 11 Ohio, 408; *Hendershot v. State*, 44 Ohio St. 208; *Langford v. Comm.*, 16 Minn. 375; *State v. Lyle*, 100 N. C. 497; *Carbon Coal Co. v. Drake*, 26 Kan. 345; *Southwestern R. v. South. & A. Tel.*, 46 Ga. 43. See also *State v. Perth Amboy*, 52 N. J. L. 132; *Foster v. Stafford Bank*, 57 Vt. 128; *McCauley v. Weller*, 12 Cal. 500.

fails to provide for its performance, has been pronounced ineffective until a proper method is prescribed.¹ But it has been intimated that, although a statute does not make sufficient provision for compensation to warrant the condemnation of property, commissioners may be appointed, nevertheless, for they may be able to acquire the necessary property by agreement.²

It has been held that the provision must be made, not only in respect to property condemned, but that, where possession of land may be taken pending proceedings to condemn, it must be made in respect to use and occupation, so that the owner may not be prejudiced in case the proceedings are discontinued.³ It seems, however, that a constitutional provision that compensation shall be paid for property damaged or injuriously affected executes itself. If the legislature sees fit to prescribe proceedings whereby this liability may be enforced,⁴ well and good. If not, the injured party may have an action at law.⁵ The reason for this is that the provision in question is usually designed to remove the promoters of public works from a privileged position, and subject them to the obligations of the common law,⁶ for the enforcement of which the ordinary legal remedies are sufficient. Where a statute provides that the owner's "damage" shall be assessed in respect to the laying of a drain over his land, "damage" is not restricted to its constitutional meaning of an injury to property not taken, but covers his whole loss, including the land condemned.⁷

Where a statute authorizes several things to be done, a provision for compensation, plainly referring to one of the things, will not be extended by implication to the others.⁸ Thus, where a city was authorized to open and widen streets by a statute providing for compensation in respect to opening, it was held that land could not be condemned for widening.⁹

¹ *Bonaparte v. Camden & A. R.*, Bald. C. C. 205; *State v. Seymour*, 35 N. J. L. 47; *Cairo & F. R. v. Turner*, 31 Ark. 494. See *United States v. Oregon R.*, 16 Fed. Rep. 524, stated in § 291.

² *Lower Chatham Drainage Case*, 35 N. J. L. 497.

³ *Davis v. San Lorenzo R.*, 47 Cal. 517. See also *St. Lawrence & A. R.*, 133 N. Y. 270.

⁴ See §§ 362 *et seq.*

⁵ See §§ 309, 377.

⁶ See § 154.

⁷ *Chaplin v. Comm.*, 129 Ill. 651.

⁸ See *Georgia South. R. v. Ray*, 84 Ga. 372; *Pittsburgh v. Scott*, 1 Pa. 309; *Pickman v. Peabody*, 145 Mass. 480.

⁹ *Chaffee's Appeal*, 56 Mich. 244.

A sufficient provision for compensation should respect the law as to time and manner of payment,¹ indicate an impartial tribunal of assessment,² and, where compensation subsequent is allowed, must contemplate the existence of a sufficient security.³ The owner cannot question the general solvency of the corporation where the statute sufficiently provides for the payment of the particular sum due to him.⁴

§ 230. The duty of the legislature to provide for compensation does not include the power to fix or limit the amount.⁵ A statute which enables one railroad company to condemn the right to use the tracks of another, and fixes the rates to be paid, is unlawful, because it involves the assessment of compensation by the legislature.⁶ A provision that the assessment of a county assessor shall be taken as a guide in estimating compensation has been declared unlawful.⁷ Commissioners, in assessing compensation, failed to follow certain imperative directions of the statute as to matters of form. The proceedings were subsequently confirmed by the legislature. It was urged that the confirmatory statute was inoperative, as it involved an assessment of compensation by the legislature. The court held, however, that the legislature had simply condoned an irregularity.⁸

As the legislature cannot fix compensation, so it cannot affect its amount by interdicting the consideration of its proper elements.⁹ Thus, Congress cannot decree that, in taking the property of a navigation company, their vested right to take tolls shall not be considered in assessing compensation.¹⁰ Nor can the legislature trench upon the powers of the tribunal of assessment by passing upon the existence, or value, of special benefits.

¹ See §§ 287-294.

² See § 320.

³ See §§ 291-293.

⁴ *Cooper v. Anniston & A. R.*, 85 Ala. 106; *Pocantico Water-Works v. Brombacher*, 17 N.Y. Supp. 661. See *McElroy v. Kansas City*, 31 Fed. Rep. 257.

⁵ *Van Horne's Lessee v. Dorrance*, 2 Dall. 304; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571; *Rich v. Chicago*, 59 Ill. 286; *Paul v. Detroit*, 32 Mich. 108; *Tripp v. Overocker*, 7 Col. 72. See also *Cunningham v.*

Campbell, 33 Ga. 625; *Lebanon School Dist. v. Lebanon Female Seminary*, 12 Atl. Rep. (Pa.) 857; *Hughes v. Todd*, 2 Duv. 188.

⁶ *Pennsylvania R. v. Baltimore & O. R.*, 60 Md. 263.

⁷ *County Court v. Griswold*, 58 Mo. 175.

⁸ *People v. McDonald*, 69 N. Y. 362.

⁹ See *Commonwealth v. Pittsburgh & C. R.*, 58 Pa. 26.

¹⁰ *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

A provision in a city charter that the local authorities shall "prescribe the limits within which private property shall be deemed benefited" by a public improvement, does not prevent a jury from returning "no benefit," for the authorities can no more determine the existence of a benefit in a particular instance, than they can its value.¹ It has been held that it is within the competency of the legislature to authorize a city to estimate compensation, and prescribe that a dissatisfied owner may appeal to a jury for a new assessment within a limited time.²

Though the legislature may not determine the price to be paid for specific property, it may set a limit to the expenditure for the whole work.³ Such a limitation is, in effect, a proviso that the work shall not be undertaken unless its cost can be brought within the prescribed amount. Therefore, the definite appropriation of each tract cannot be made until the whole cost can be fairly estimated. This right to count the cost of an improvement is illustrated in cases involving the discontinuance of proceedings.⁴

§ 231. An important question in respect to the provision under consideration is: Who shall set in motion the proceeding by which the obligation to pay compensation shall be satisfied? Now a statute which authorizes the occupation of property for public use, and leaves the compensation to be recovered by the owner in a suit at law or equity, does not make a just provision. The legislature gives nothing to the owner, it simply recognizes his ability to invoke the aid of the courts in order to compel the expropriators to perform their duties.⁵ It has been held that, even where the statute prescribes a form of proceeding which the owner may institute, there is not a sufficient provision if payment of compensation is made to depend upon the request of the owner;⁶ though a different opinion has been entertained

¹ *City of Kansas v. Baird*, 98 Mo. 215.

² *Cambridge v. County Comm.*, 117 Mass. 79.

³ *Shoemaker v. United States*, 147 U. S. 282.

⁴ See §§ 196-199.

⁵ See *Parker v. East Tennessee, V. & G. R.*, 13 Lea, 669.

⁶ *Levee Comm. v. Dancy*, 65 Miss.

335; *Atchison, T. & S. F. R. v. Weaver*, 10 Kan. 344; *American Tel. Co. v. Pearce*, 71 Md. 535. See also *Republican Val. R. v. Fink*, 18 Neb. 82. See *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394.

where the actor is the state or one of its political corporations.¹ On the other hand, expropriators have been enabled to obtain a lawful possession of property, under a statute which prescribes a special proceeding for the owner's benefit, or expressly reserves to him the right to bring a common-law action.² While this practice has been disapproved, on the ground that the governing constitution requires compensation precedent,³ it is not commendable in any case where there is a definite appropriation of property, especially where the actor is a private corporation. The loss to the owner can be measured at once, and the obligation to pay indemnity should be discharged by the expropriators, not left to be enforced by the owner. The proper and usual statutory provision is, that the expropriators shall pay the compensation assessed in formal proceedings to condemn. In case, however, there is not a definite appropriation of property, but a consequential injury, the practice of making the payment of compensation hinge upon the complaint of the party injured is generally unobjectionable.⁴

THE MEASURE OF COMPENSATION.

§ 232. The principles according to which compensation should be assessed are now to be determined. The illustrative cases are chiefly based on regular condemnation proceedings, but the same rules for computation obtain where the owner takes the initiative and sues for compensation under the statute.⁵

§ 233. **Compensation according to the Interest Acquired.** — In assessing compensation, the interest to be acquired in the land condemned should be accurately determined. If, after condemnation, valuable rights of enjoyment in the property still remain in the owner,⁶ allowance must be made for them. Thus, where a strip twenty-five feet wide is taken, of which ten feet is for a road and fifteen for a supporting slope, the fact that the owner may use the slope should be considered in estimating

¹ *Cage v. Tragar*, 60 Miss. 563.

² *Den v. Morris Canal Co.*, 24 N. J. L. 387.

³ *Levee Comm. v. Dancy*, 65 Miss. 335.

⁴ See § 362.

⁵ *Dodson v. Cincinnati*, 34 Ohio St. 276; *Lehigh Valley R. v. McFarlan*, 43 N. J. L. 605.

⁶ See §§ 204, 215.

compensation.¹ It has been said, that where land is taken for a turnpike compensation should be assessed for the damage, not for the value of the land, as only a right of way is taken ;² but the better opinion is that where a surface easement, especially an exclusive one of indefinite duration, is condemned, the reversionary interest of the owner is too remote to be considered, and compensation should be equal to that payable on the taking of a fee.³ Where, according to the statute, a certain interest in property is acquired by force of condemnation, the expropriators cannot decrease compensation by asserting that, in all probability, the whole interest will not be actually taken. The liability of expropriators is predicated upon what they are entitled to take, not what they may choose to take. Hence, a water company, having condemned the right to draw off all the waters of a pond, cannot assert the improbability of wholesale diversion in order to reduce compensation.⁴ Where a corporation elects to condemn a whole tract, it cannot have compensation assessed on the theory that it will in fact use but a part.⁵ Where land is occupied temporarily for purposes other than the taking of materials, compensation should be assessed in the form of rent based on the value of the use and occupation.⁶ Companies organized under the Railway Clauses Act⁷ may acquire the temporary use of land, during the period of construction, upon paying compensation in a gross sum or in half yearly instalments assessed according to the rules prescribed in the Lands Clauses Act. Upon the termination of the use, they must compensate for all permanent injury done. But, if the landowner does not accept compensation for a temporary use, he may compel the purchase of the land. In some cases the legislature has provided that when land is flooded by reason of the authorized construction of dams, an annual com-

¹ *Dodson v. Cincinnati*, 34 Ohio St. 148 Pa. 429; *Joy v. Water Co.*, 85 Me. 276.

² *Quigley's Case*, 3 Pen. & W. 139. See also *Roberts v. County Comm.*, 21 Kan. 247.

³ *Clayton v. Chicago, I. & D. R.*, 67 Iowa, 238. See also *Murray v. County Comm.*, 12 Met. 455. See § 207.

⁴ *Howe v. Weymouth*, 148 Mass. 605. See also *Miller v. Windsor Water Co.*,

⁵ *Cummins v. Des Moines & S. L. R.*, 63 Iowa, 397.

⁶ *Johnson's Case*, 2 Ct. Cl. 391; *Pope v. United States*, 26 Ct. Cl. 11; *Tait's Exr. v. Central Lunatic Asylum*, 84 Va. 271.

⁷ Sects. 32 *et seq.*

pensation shall be paid.¹ Where the property condemned is abandoned before the assessment of compensation, it seems that the abandonment should be taken into account in ascertaining the sum payable.²

Market Value.

§ 234. The most important and often the only step,³ in the assessment of compensation, is the determination of the market value of the property affected. This value is presumably its present worth in cash.⁴ The market value of property is not affected by the personality or needs of its owner. The property is not to be valued in the light of any convenience or association which may make it peculiarly desirable to the possessor, but solely with regard to the elements which would make up its worth to any person happening to own it.⁵ The impersonal quality of market value is further illustrated by the rule which forbids consideration of the necessities of the expropriators, or the probable value of the property under their management.⁶

It has been suggested that the sum for which property could be sold at a public auction, conducted in the fairest possible manner, represents its true market value.⁷ The objection to this criterion is, that one selling by auction is frequently acting under a compulsion more or less severe. The best criterion of market value is a price which would be fixed after a fair negotiation between parties willing, but not compelled, to treat;⁸ but where the assessment is dominated by this principle there may be no objection to taking auction value into consideration.⁹

¹ *Billings v. Berry*, 50 Me. 31; *Fuller v. French*, 10 Met. 359.

² *Hastings v. Burlington & M. R.*, 38 Iowa, 316; *Pinkerton v. Boston & A. R.*, 109 Mass. 527.

³ See § 252.

⁴ *Brown v. Calumet River R.*, 125 Ill. 600. See *Cincinnati & G. R. v. Mims*, 71 Ga. 240.

⁵ See *Pittsburgh & L. R. v. Robinson*, 95 Pa. 426.

⁶ *San Diego Land Co. v. Neale*, 88 Cal. 50; *Montgomery County v. Schuylkill Bridge*, 110 Pa. 54; *Selma, R. & D. R. v. Keith*, 53 Ga. 178; *Moulton v. Newburyport Water Co.*, 137 Mass. 163;

Sullivan v. Lafayette County, 61 Miss. 271; *Union Depot Co. v. Brunswick*, 31 Minn. 297; *Boston, H. T. & W. R.*, 22 Hun, 176; *New York, L. & W. R.*, 33 Hun, 639; *Stebbing v. Met. Board of Works*, L. R. 6 Q. B. 37; *Penny v. Penny*, L. R. 5 Eq. 227.

⁷ *Low v. Railroad Co.*, 63 N. H. 557.

⁸ *Boom Co. v. Patterson*, 98 U. S. 403; *Pittsburgh & C. R. v. Vance*, 115 Pa. 325; *Somerville & E. R. v. Doughty*, 22 N. J. L. 495; *Everett v. Union Pacific R.*, 59 Iowa, 243; *Lawrence v. Boston*, 119 Mass. 126.

⁹ See *Pittsburgh & C. R. v. Vance*, 115 Pa. 325.

§ 235. Evidence has been admitted in respect to the price paid for the property,¹ and moneys expended on it² though it has been said that cost bears very slightly on the question of market value.³ According to other decisions evidence of cost should be excluded.⁴ It might be going too far to say that evidence of cost should not be received in any case, but as a rule it should be refused. While the element of cost may influence the price put upon a thing by the seller, it is of little weight with the buyer. Whatever view may be taken as to the bearing of cost upon market value, cost must never be made the actual criterion of value. Hence, where it was enacted that the expense incurred in building a railroad should represent the compensation payable upon the condemnation of the road, the statute was declared invalid.⁵

Admissions of the owner as to value have been received, if made within a reasonable time.⁶ In assessing compensation for taking the property of a bridge company, the jury may consider a certified copy of the return made to the auditor-general by the officers of the company, setting forth the value of the property for purposes of taxation.⁷ Evidence of the owner's willingness or unwillingness to sell is irrelevant.⁸ Offers to purchase the land in question have been disregarded.⁹

The value of property as assessed for purposes of taxation is generally considered irrelevant to market value.¹⁰ But where

¹ *New Orleans, &c. R. v. Barton*, 43 La. An. 171; *Cobb v. Boston*, 109 Mass. 438. See *Spring Valley Waterworks Co. v. Drinkhouse*, 92 Cal. 528.

² *Streatham v. Comm.*, 52 J. P. 615.

³ *Brown v. Calumet River R.*, 125 Ill. 600. See also *Chicago, P. & S. L. R. v. Eaton*, 136 Ill. 9.

⁴ *New York, W. S. & B. R.*, 37 Hun, 317; *Mifflin Bridge v. Juniata County*, 144 Pa. 365; *San Antonio & A. R. v. Ruby*, 80 Tex. 172.

⁵ *Commonwealth v. Pittsburgh & C. R.*, 58 Pa. 26.

⁶ *Patch v. Boston*, 146 Mass. 52; *Brown v. Calumet River R.*, 125 Ill. 600; *Springer v. Chicago*, 135 Ill. 552; *Ottawa, O. C. & C. G. R. v. Adolph*, 41 Kan. 600; *East Brandywine & W. R. v. Ranck*, 78 Pa. 454. See *Tufts v.*

Charlestown, 4 Gray, 537; *New Orleans Pacific R. v. Murrell*, 36 La. An. 344; *Bookman v. New York El. R.*, 137 N. Y. 302.

⁷ *Mifflin Bridge v. Juniata County*, 144 Pa. 365.

⁸ *Pennsylvania S. V. R. v. Cleary*, 125 Pa. 442; *Lawrence v. Boston*, 119 Mass. 126.

⁹ *Louisville, N. O. & T. R. v. Ryan*, 64 Miss. 399; *Hine v. Manhattan R.*, 132 N. Y. 477. See also *Selma, R. & D. R. v. Keith*, 53 Ga. 178; *Santa Ana v. Harlin*, 34 Pac. R. 224 (Cal. 1893). See *Trent-Stoughton v. Barbadoes Water Co.* (1893), A. C. 502.

¹⁰ *San José & A. R. v. Mayne*, 83 Cal. 566; *Springfield & M. R. v. Rhea*, 44 Ark. 258. See *Brown v. Providence, W. & B. R.*, 5 Gray, 35; *New Orleans, F. &*

the owner of land was a member of a board of tax assessors, who had valued it at \$5,000 for taxing purposes, and he testified that it was worth \$23,000, and claimed \$10,000 compensation for injury to it, it was held that, while he was not estopped from asserting a higher value than that assessed, the assessed value might be given in evidence.¹

In fixing market value no regard should be paid to an appraisalment of the property made in an earlier stage of the proceedings.² Where, however, a suit is brought to recover compensation which has been duly assessed, the amount due is conclusively determined.³

§ 236. Prices paid by private parties for other lands are sometimes considered relevant, as they assist the judgment of the tribunal in fixing the market value of the land in question.⁴ Evidence of this sort must relate to property similar to that under consideration.⁵ Land specially benefited by the proposed improvement is not similar to land taken.⁶ The sales must be of land in the vicinity of the property condemned.⁷ Vicinity is to be defined with regard to the character of the land in question. In the case of ordinary property, such as farm lands or town lots, it means in the immediate neighborhood. But where property is of a special or uncommon character, *vicinity* may be given a wider application.⁸ Thus in valuing a cranberry bog,⁹ or an island,¹⁰ prices paid for similar property in the same general locality may be considered. The sales must have been made

G. R. v. Barton, 43 La. An. 171; Miffin Bridge v. Juniata County, 144 Pa. 365; Miller v. Windsor Water Co., 148 Pa. 429.

¹ Smith v. Pennsylvania S. V. R., 141 Pa. 68.

² Seefeld v. Chicago, M. & S. R., 67 Wis. 96; Chicago, K. & N. R. v. Broquet, 47 Kan. 571; Goodwine v. Evans, 33 N. E. Rep. 1031 (Ind. 1893). See also Bohr v. Neuenschwander, 120 Ind. 449; Winklemans v. Des Moines North. R., 62 Iowa, 11; White v. Boston & P. R., 6 Cush. 420.

³ Bridgman v. St. Johnsbury & L. C. R., 58 Vt. 198; Lake Erie & W. R. v. Griffin, 107 Ind. 464.

⁴ Provision Co. v. Chicago, 111 Ill. 651; Washburn v. Milwaukee & L. W. R., 59 Wis. 364. See also Grand Rapids v. Luce, 92 Mich. 92.

⁵ Patch v. Boston, 146 Mass. 52; Phillips v. Marblehead, 148 Mass. 326; Thompson v. Boston, 148 Mass. 387; Cherokee v. Town Lot, etc. Co., 52 Iowa, 279.

⁶ Kerr v. South Park Comm., 117 U. S. 379.

⁷ See Packard v. Bergen Neck R., 54 N. J. L. 553.

⁸ See Ham v. Salem, 100 Mass. 350.

⁹ Gardner v. Brookline, 127 Mass. 358.

¹⁰ Benham v. Dunbar, 103 Mass. 365.

within a reasonable time,¹ though what is a reasonable time depends somewhat on the frequency of transfers of property in the locality. Therefore, inquiry as to sales in a sparsely settled locality may be directed to transactions of a more remote period than would be admissible in the case of urban property.² Prices paid at sales between the taking of the land in question and the assessment of compensation have been deemed incompetent as independent evidence,³ though it has been said that evidence in respect to sales made from five to twenty months after the taking need not be necessarily excluded from consideration.⁴ In some decisions the relevancy of sales of other property is denied on principle.⁵ In *Pittsburgh & Western Railroad Company v. Patterson*,⁶ the denial was placed on the ground that such evidence would tend to raise collateral issues, but it was held that the general selling price of land in the vicinity was admissible.

Evidence as to the price offered for similar property, or the price at which such property is held, is irrelevant.⁷

§ 237. Evidence of the prices paid for other land needed for the undertaking in question is usually rejected.⁸ This view has not been taken in some decisions, because of the similarity of the several properties.⁹ Thus, where a city condemned a wharf property, evidence was admitted in respect to prices paid by the city

¹ *Everett v. Union Pacific R.*, 59 Iowa, 243.

² *Benham v. Dunbar*, 103 Mass. 365.

³ *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305.

⁴ *Roberts v. Boston*, 149 Mass. 346. See *Sheldon v. Minneapolis & S. R.*, 29 Minn. 318; *Hunt v. Boston*, 152 Mass. 168.

⁵ *East. Pennsylvania R. v. Helster*, 40 Pa. 53; *Pittsburgh, V. & C. R. v. Vance*, 115 Pa. 325; *Stinson v. Chicago, S. & M. R.*, 27 Minn. 284. See *Thompson's Case*, 127 N. Y. 463; *Cent. Pacific R. v. Pearson*, 35 Cal. 247; *Chicago, K. & N. R. v. Stewart*, 47 Kan. 704; *Seefeld v. Chicago, M. & S. P. R.*, 67 Wis. 96.

⁶ 107 Pa. 461.

⁷ *Sherlock v. Chicago, B. & Q. R.*, 130 Ill. 403; *Muller v. South. Pacific, &c. R.*, 83 Cal. 240; *Davis v. Charles River R.*, 11 Cush. 506; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Lehmicke v. St. Paul, S. & T. R.*, 19 Minn. 464; *Montclair R. v. Benson*, 36 N. J. L. 557; *Currie v. Waverly & N. Y. B. R.*, 52 N. J. L. 381.

⁸ *Cobb v. Boston*, 112 Mass. 181; *Pennsylvania S. V. R. v. Ziemer*, 124 Pa. 560; *Howard v. Providence*, 6 R. I. 514; *Amoskeag Co. v. Worcester*, 60 N. H. 522; *Peoria Gas Light, etc. Co. v. Peoria, etc. R.*, 146 Ill. 372. See *Concord R. v. Greely*, 23 N. H. 237; *Laing v. United N. J. R.*, 54 N. J. L. 576.

⁹ *Wyman v. Lexington & W. C. R.*, 13 Met. 316.

for other wharves.¹ But similarity of properties is not necessarily a sufficient test. Thus, where a railroad company buy part of a tract of land, the price paid is no criterion of the market value of neighboring land which they condemned, for the purchase-money presumably covers, not only the land taken, but the injury to the remainder caused by proper construction.²

Prices paid by the expropriators in the condemnation of other lands have been disregarded,³ and also the price paid by another corporation for a right of way over the tract in question.⁴ Although a distinction has been drawn between prices paid on agreement in lieu of condemnation, and on condemnation itself,⁵ the better opinion is that the distinction is illusory, as in the first case the owner has practically as little freedom of choice as in the second, and agrees simply to save the inconvenience of formal proceedings.⁶

§ 238. **Present Condition of Land.** — As a rule the property condemned is to be valued as it stands. But where the owner is willing to remove something affixed to the soil, and not needed for the public use, there seems to be no objection to his so doing and recovering the expense of removal and rehabilitation, if this is necessary, provided this does not exceed the value of the thing;⁷ unless, indeed, the public exigency necessitates so immediate a possession as to preclude an orderly removal. The expropriators may assert that there is something, part of the realty, which is not needed for the public use, and which can be removed, and that therefore the owner should be paid only the cost of removal and rehabilitation, if necessary, and not its value. The legislature may provide for this case.⁸

What is the rule where the statute is silent, and the owner is not willing to remove, but prefers full compensation for his property as it stands? It is usually held that the owner may treat the condemnation of his land as the condemnation of all

¹ *Langdon v. New York*, 133 N. Y. 628.

² See *Presbrey v. Old Colony R.*, 103 Mass. 1.

³ *Springfield v. Schmook*, 68 Mo. 394; *Amoskeag Co. v. Head*, 59 N. H. 332.

⁴ *Brunswick & A. R. v. McLaren*, 47 Ga. 546.

⁵ *Wyman v. Lexington & W. C. R.*, 13 Met. 316.

⁶ *Cobb v. Boston*, 112 Mass. 181.

⁷ See *Council Grove, O. & O. R. v. Center*, 42 Kan. 438; *Forney v. Fremont, E. & M. R.*, 23 Neb. 465.

⁸ See § 240.

things connected therewith, and is not obliged to change the condition of his land in order to decrease the liabilities of the expropriators.¹ In *Rider v. Stryker*,² commissioners, in assessing compensation for laying out a road through a wood lot, refused compensation for the timber, as the cost of removal and grubbing up the roots would equal its value. The assessment was set aside on the ground that the owner was not bound to put his land in condition for the road, but was entitled to its value as timber land. The rule has been applied in respect to buildings on the land appropriated, even where the owner has adjoining land to which they might be removed.³ But it has been held that where a fence, standing on the part of a tract which is taken, can be removed and reset on the part remaining, the owner can claim only the cost of removal and resetting.⁴

§ 239. There is a well-known rule that where one builds wilfully on the land of another, the improvements belong to the owner of the soil.⁵ Where expropriators have entered and built upon land before instituting proper proceedings to condemn, the owners have frequently claimed the benefit of this rule and demanded compensation for the improvements. Such claims have been sustained where the entry was wholly wrongful.⁶ But the rule is not applicable where there is any evidence that possession was taken with the acquiescence of the owner,⁷ or the life tenant,⁸ or a municipal corporation which had not perfected its own title,⁹ or where the corporation had reason to expect that its title would be perfected by agreement.¹⁰ In another group of

¹ *Schuchardt v. New York*, 53 N. Y. 202. *Meriam v. Brown*, 128 Mass. 391. See *Schroeder v. De Graff*, 28 Minn. 299.

² 63 N. Y. 136.

⁷ *St. Johnsbury R. v. Willard*, 61

³ *Paul v. Newark*, 6 Am. L. Rev. 576; *Vt.* 134; *North Hudson County R. v. Finn v. Providence Gas, etc. Co.*, 99 Pa. 631; *Kansas City v. Morse*, 105 Mo. 510.

Booraem, 28 N. J. Eq. 450; *Norwood v. Montreal R.*, 47 Hun, 489. See also

⁴ *Hire v. Kniseley*, 130 Ind. 295.

Dows v. Congdon, 16 How. Pr. 571.

⁵ See *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Steel v. Smelting Co.*, 106 U. S. 447.

See *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31.

⁸ *Chicago & G. R. v. Goodwin*, 111

⁶ *Long Island R.*, 6 T. & C. (N. Y.) Ill. 273.

298; *New York, W. S. & B. R.*, 37 Hun,

⁹ *Baltimore & O. R. v. Boyd*, 63 Md.

317; *Graham v. Connersville & N. C. R.*,

325.

36 Ind. 463; *United States v. Land in Monterey County*, 47 Cal. 515. See also

¹⁰ *Morgan's Appeal*, 39 Mich. 675.

decisions, the rule is declared wholly inapplicable where the state or its agents are concerned. The broad ground is taken, that while an irregular entry for public use is a technical trespass, yet the title to improvements should not vest in the owner, because the possession can be legitimated by lawful proceedings, and for the broader reason that the improvements themselves are not intended to be adjuncts to the freehold, but are made simply to subserve a use in which the landowner has no interest.¹ The rule has been also declared irrelevant where possession has been taken, and improvements made, under an agreement with one who has no title to the land. In *Searl v. School District*,² a school board purchased land from one who had no title, and built a school-house. The true owner having established his title, the board proceeded to condemn the land, and were confronted with a claim for the value of the house. The Supreme Court held that as the land had been purchased in good faith, and with the advice of counsel, the strict rule of law should not be applied, even though Searl had given notice of his claim. A corporation entered and improved under an arrangement with a mortgagee in possession, supposing that he could make title and convey. Proceedings to condemn were afterwards instituted with the real owner as a party, and his claim for the value of the improvements was denied.³

§ 240. The rule that property is to be valued in the light of its present condition has been qualified by the legislature in some cases, in order that a political corporation may preempt a sufficient interest in land, without being obliged to pay for improvements. Thus, the legislature may provide that a city in widening a street may condemn the necessary *land* only, leaving such buildings standing as do not interfere with the public use, and only acquiring the actual use of the land when the build-

¹ *Justice v. Nesquehoning Val. R.*, 14 Or. 519; *Louisville, N. O. & T. R. v.* 87 Pa. 28; *San Francisco & N. R. v. Dickson*, 63 Miss. 380; *Greve v. St. Taylor*, 86 Cal. 246; *Preston v. Sabine Paul & P. R.*, 26 Minn. 66. See also & *E. T. R.*, 70 Tex. 375; *Lyon v. Green Lowther v. Caledonian R.* (1892), 1 Ch. Bay & M. R., 42 Wis. 539; *Toledo, A.* 73.
² *A. & G. T. R. v. Dunlap*, 47 Mich. 456; ³ 133 U. S. 553.
Chicago & A. R. v. Goodwin, 111 Ill. ³ *Ellis v. Rock Island & M. R.*, 125 273; *Jones v. New Orleans & S. R.*, 70 Ill. 82.
Ala. 227; Oregon R. & N. Co. v. Mosier,

ings are removed or destroyed.¹ A law was passed adding five feet to the width of a street, but with the proviso that existing buildings should not be interfered with. The owner of one of the buildings in question destroyed it with the intention of rebuilding upon the original site. This action released the suspended eminent domain, and effected the condemnation of the land needed to make the full width of the street.² But it has been held that town authorities in laying out a street cannot, of their own motion, permit a building to encroach upon it "while the present building stands."³ Where a house stands within the lines of a projected street, and the authorities decide that it may remain until its owner chooses to remove it, the owner may disregard the decision, treat the location as absolute, and immediately claim compensation for its removal.⁴

The legislature may recognize the fact that things may be removed under certain circumstances without disadvantage to the owner, and with advantage to the expropriators.⁵ Thus, it has been enacted that where improved land is subjected to a highway easement, the cost of the removal of buildings shall be the only compensation in respect to them, provided the owner has adjoining land upon which they can be suitably placed.⁶ The legislature may provide that where trees are upon land taken for a highway easement, the commissioners may allow the owner a reasonable time within which to remove them. In case they are not removed, the owner will be deemed to waive compensation for them, and their value for the purpose of removal may be deducted from the compensation awarded.⁷

In case the property suffers an injury, not referable to the public purpose in question, the loss must be borne by the owner or expropriator, according as the injury occurs before or after the rights of the parties are fixed.⁸ Thus, where proceedings to condemn a bridge are begun, and before the acceptance of the report the bridge is destroyed by a flood, the owner must bear the loss.⁹

¹ *St. Louis v. Connecticut Mut. Life Ins. Co.*, 90 Mo. 135.

² *Philadelphia v. Linnard*, 97 Pa. 242.

³ *Colbourn v. Kittridge*, 131 Mass. 470.

⁴ *Brown v. Worcester*, 13 Gray, 31.

⁵ *White v. Foxborough*, 151 Mass. 28; *Benton v. Brookline*, 151 Mass. 250.

⁶ *Mangles v. Freeholders*, 55 N. J. L. 88.

⁷ *Murray v. Norfolk County*, 149 Mass. 328.

⁸ *Sunderland Bridge*, 122 Mass. 459.

⁹ *Farmer v. Hooksett*, 28 N. H. 244.

§ 241. The general meaning of the present condition of land having been explained, the particular elements which may make up the condition will be noted. Buildings, and other erections, are part of the realty, and are to be valued as they stand.¹ Where part of a building is taken, the measure of compensation is the damage done to the whole.² Where the owner of a building, partly destroyed, tears down the remainder, instead of repairing it, and erects a new building, he cannot have compensation for loss of rent during the period of construction.³ It has been held that where a building is in course of erection the owner may give evidence of its cost to date, architect's fees, and the sum due to the contractor, and may have loss of time and capital taken into account;⁴ but such details have been deemed irrelevant, and the general relation of the building to the market value of the land only considered.⁵ Where the owner of a ground lease makes improvements and fails to remove them before the expiration of his term, he cannot obtain their value upon the condemnation of the property.⁶ Fixtures are part of the land, and their value in connection therewith may be shown.⁷ Where a water-cure establishment was condemned, it was held that the corporation must pay the difference between the value of the fixtures in connection with the establishment, and their value if removed and applied to other uses.⁸

§ 242. Products of the soil, which attain their ultimate value only when severed, are not to be valued as commodities, but as component parts of the land. Thus, the value of crops, orchards, timber, etc., should be estimated in connection with the land.⁹

¹ *Ford v. County Comm.*, 64 Me. 408; *Chicago, I. & K. R. v. Knuffke*, 36 Kan. 367; *Lafayette, B. & M. R. v. Winslow*, 66 Ill. 219; *Central Bridge Co. v. Lowell*, 15 Gray, 106. ⁷ *Edmands v. Boston*, 108 Mass. 535; *Allen v. Boston*, 137 Mass. 319; *Gibson v. Hammersmith & C. R.*, 2 Dr. & Sm. 603.

² See *Meyer v. Newark*, 6 Am. L. Rev. 576; *Patterson v. Boston*, 23 Pick. 425. ⁸ *Price v. Milwaukee & S. P. R.*, 27 Wis. 98.

³ *Boles v. Boston*, 136 Mass. 398. ⁹ *Lance v. Chicago, M. & S. P. R.*, 57 Iowa, 636; *Haislip v. Wilmington & W. R.*, 102 N. C. 376; *St. Louis, V. & T. H. R. v. Mollet*, 59 Ill. 235; *Seattle & M. R. v. Scheike*, 3 Wash. 625; *Rider v. Stryker*, 63 N. Y. 136; *Texas & S. L. R. v. Matthews*, 60 Tex. 215; *Gilmore v. Pittsburgh, V. & C. R.*, 104 Pa. 275.

⁴ *Chicago, M. & S. P. R. v. Hock*, 118 Ill. 587. ⁵ *Schuykill Nav. Co. v. Farr*, 4 W. & S. 362.

⁶ *Schreiber v. Chicago & E. R.*, 115 Ill. 340.

The owner has been allowed to show the value per load of compost spread upon the land,¹ but not the value of peat spread out to dry.²

Compensation may be claimed in respect to undeveloped mineral deposits, the extent, perhaps even the existence, of which may be matters of speculation. The probability of the existence of minerals must be supported by competent evidence.³ The mere fact that land is designated as "placer" is not proof that it contains precious metals.⁴ In *Searle v. Lackawanna & Bloomsburg Railroad Company*,⁵ it was decided that land containing an unworked deposit of coal should be valued in a general way as coal land, and that the coal should not be put in specially, as this would involve such uncertain quantities as the number of tons and cost of production. This sound rule for the valuation of mineral lands is the prevailing one.⁶ Where the state's right to deposits of precious metal⁷ passes to the grantee of the land,⁸ he may, in the event of condemnation, have compensation assessed in respect to the deposits. But if the state has not surrendered its ownership of the metals, it may condemn land without paying compensation for prospective gold mines.⁹

§ 243. **Present Use of Land.** — One whose land is taken may show the use to which it is put. Unless present adaptability to more advantageous uses can be shown,¹⁰ the property should be valued in the light of the present use, — that is, its worth to a purchaser desiring to make the same use of it. The application of this rule where the land is put to agricultural, residential, ordinary business, or other common uses does not call for special illustration. The fact that the use is such that peculiar improvements have been made in order to subserve it, or that the property is so situated as to render it peculiarly suitable for the use

¹ *Chicago & E. R. v. Jacobs*, 110 Ill. 414. Pa. 472; *Doud v. Mason City & F. D. R.*, 76 Iowa, 438. See *Providence & W. R. v. Worcester*, 155 Mass. 35.

² *Gile v. Stevens*, 13 Gray, 146.

³ *Montana R. v. Warren*, 137 U. S. 348; *Brown v. Comm. for Railways*, 15 App. Cas. 240.

⁴ *Twin Lakes, etc. Co. v. Colorado Mid. R.*, 16 Col. 1.

⁵ 33 Pa. 57.

⁶ *Reading & P. R. v. Balthaser*, 119

⁷ 1 Blackstone, 294; *Cooley*, Const. Lim. (6th ed.) 643.

⁸ See *Moore v. Smaw*, 17 Cal. 199.

⁹ *Shoemaker v. United States*, 147 U. S. 282.

¹⁰ See §§ 245-247.

to which it is put, may be considered in estimating market value.¹ Thus it may be shown that the premises are specially suitable for a coal-yard,² a brick-yard,³ a plow factory.⁴ It has been held that where a business has been so conducted as to establish what is known as a good-will, this may be a factor of market value.⁵ According to some decisions neither the particular use made of the property,⁶ nor the good-will of a business,⁷ is relevant to market value.

§ 244. Evidence of profits from tilling the soil, or from business, has been rejected, as too dependent on personal considerations to be a fair criterion of market value.⁸ In *Langdon v. New York*,⁹ the city, in condemning a wharf, offered evidence of the amount of wharfage collected, and estimates of annual income. The court held that the present productiveness of the property was not an evidence of its intrinsic value. But there are cases in which evidence of profits has been found satisfactory.¹⁰ Thus, where water was diverted from a mill, evidence of the profits of the mill for the preceding year was received, as tending to show the productiveness of the property.¹¹

Where a franchise is taken,¹² profits have been considered. A franchise confers the right to conduct a particular business. The value of the business done is, therefore, an index to the value of the franchise. Hence, in valuing a franchise, it has been held

¹ *Dupuis v. Chicago & N. W. R.*, 115 Ill. 97; *Price v. Milwaukee & S. P. R.*, 27 Wis. 98; *Republican Val. R. v. Arnold*, 13 Neb. 485. See *Met. B'd of Works v. McCarthy*, L. R. 7 H. L. 243.

² *Chicago v. Taylor*, 125 U. S. 161. ³ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

⁴ *Rumsey v. New York & N. E. R.*, 136 N. Y. 543. ⁵ *King v. Minneapolis Union R.*, 32 Minn. 224. ⁶ *King v. Minneapolis Union R.*, 32 Minn. 224; *McCauley's Case*, 18 Ont. 416; *Lambton's Case*, 3 Ch. D. 36; *White v. Comm. of Works*, 22 L. T. n. s. 591.

⁷ *Whitman v. Boston & M. R.*, 3 Allen, 133. ⁸ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

⁹ *King v. Minneapolis Union R.*, 32 Minn. 224; *McCauley's Case*, 18 Ont. 416; *Lambton's Case*, 3 Ch. D. 36; *White v. Comm. of Works*, 22 L. T. n. s. 591.

¹⁰ *Whitman v. Boston & M. R.*, 3 Allen, 133. ¹¹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

¹² *Whitman v. Boston & M. R.*, 3 Allen, 133. ¹³ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

¹⁴ *Whitman v. Boston & M. R.*, 3 Allen, 133. ¹⁵ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

¹⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133. ¹⁷ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

¹⁸ *Whitman v. Boston & M. R.*, 3 Allen, 133. ¹⁹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

²⁰ *Whitman v. Boston & M. R.*, 3 Allen, 133. ²¹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

²² *Whitman v. Boston & M. R.*, 3 Allen, 133. ²³ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

²⁴ *Whitman v. Boston & M. R.*, 3 Allen, 133. ²⁵ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

²⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133. ²⁷ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

²⁸ *Whitman v. Boston & M. R.*, 3 Allen, 133. ²⁹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

³⁰ *Whitman v. Boston & M. R.*, 3 Allen, 133. ³¹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

³² *Whitman v. Boston & M. R.*, 3 Allen, 133. ³³ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

³⁴ *Whitman v. Boston & M. R.*, 3 Allen, 133. ³⁵ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

³⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133. ³⁷ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

³⁸ *Whitman v. Boston & M. R.*, 3 Allen, 133. ³⁹ *Stockton & C. R. v. Galgiani*, 49 Cal. 139; *De Buol v. Freeport & M. R.*, 111 Ill. 499; *New York, W. S. & B. R.*, 35 Hun, 633; *Cobb v. Boston*, 109 Mass. 438; *Maynard v. Northampton*, 136 N. Y. 543.

that the income of the corporation may be shown.¹ In valuing the property and franchises of a corporation, it has been held that the market value of the corporate stock may be considered.²

It seems, that in some cases the owner of a tract, part of which is taken, may prove depreciation in the rental value of the remainder.³ But the earning capacity of land, as shown by the rent it produces, is not usually an independent criterion of market value. If the premises are not actually rented, their rental value is wholly speculative. If they are rented, the lessee has an interest in the compensation, and the legitimate effect of the lease on the value of the land necessarily appears in adjusting the claims of the lessor and lessee.⁴

§ 245. *Present Adaptability of Property to other Uses.* — The owner may show the adaptability of the property to other, and more profitable, uses than that to which it is at present devoted, and have the market value appraised with reference to the new use.⁵ To this end it may be shown that the property can be used advantageously as a site for a log-boom,⁶ a bridge,⁷ a wharf,⁸ or a mill.⁹ Evidence may be given of an unused water-power,¹⁰ an unworked mine,¹¹ or a deposit of gravel or mineral.¹² Where a railroad company condemned land for a riparian terminus the owner was permitted to prove the peculiar desirability

¹ *Columbia Delaware Bridge v. Geisse*, 38 N. J. L. 39; *Montgomery County v. Schuylkill Bridge*, 110 Pa. 54.

² *Mifflin Bridge v. Juniata County*, 144 Pa. 365. See *Kensington Turnpike*, 97 Pa. 260.

³ See § 261.

⁴ See § 304.

⁵ *Furman St.*, 17 Wend. 649; *Goodin v. Cincinnati & W. Canal*, 18 Ohio St. 169; *Young v. Harrison*, 17 Ga. 30; *Mississippi River Bridge v. Ring*, 58 Mo. 491; *Portland & R. R. v. Deering*, 78 Me. 61; *Maynard v. Northampton*, 157 Mass. 218; *Amoskeag Co. v. Worcester*, 60 N. H. 522; *Somerville & E. R. v. Doughty*, 22 N. J. L. 495; *Russell v. St. Paul, M. & M. R.*, 33 Minn. 210. See *Fairbanks v. Fitchburg*, 110 Mass. 224.

⁶ *Boom Co. v. Patterson*, 98 U. S. 403.

⁷ *Little Rock Junct. R. v. Woodruff*, 49 Ark. 381; *Shenandoah Val. R. v. Shepherd*, 26 W. Va. 672.

⁸ *Drury v. Midland R.*, 127 Mass. 571; *Calumet River R. v. Moore*, 124 Ill. 329; *Louisville, N. O. & T. R. v. Ryan*, 64 Miss. 399.

⁹ *Dupuis v. Chicago & N. W. R.*, 115 Ill. 97.

¹⁰ *Haslam v. Galena & S. W. R.*, 64 Ill. 353; *Dorlan v. East Brandywine & W. R.*, 46 Pa. 520. See *New Britain v. Sargent*, 42 Conn. 137; *Trent-Stoughton v. Barbadoes Water Supply Co.* (1893), A. C. 502.

¹¹ *Haslam v. Galena & S. W. R.*, 64 Ill. 353.

¹² *Montana R. v. Warren*, 137 U. S. 348; *Providence & W. R. v. Worcester*, 155 Mass. 35; *Brown v. Comm. for Railways*, 15 App. Cas. 240.

of his land for the purpose, by showing that two-thirds of the local shore front was already devoted to railroad uses, and that the land available for approaches was limited.¹ The value of land may be enhanced by the character of the neighborhood. Thus, farm land near a town may have a peculiar value, owing to its availability for building lots.²

§ 246. In all cases the value must be actual, not speculative. The land is not to be valued as if the possible use were in existence, but at its present worth in view of the possibility.³ Hence, evidence will not be admitted to prove the value of a lot if a building were placed upon it.⁴ Nor can land near a town be appraised as if it were already divided into building lots.⁵ So, the fact that land is mapped into lots,⁶ or that streets are mapped out over it,⁷ does not warrant its valuation as if the improvement had been made.

Adaptability must not hinge upon the expenditure of money by the owner, nor upon the assistance of outside parties.⁸ Hence, the owner will not be allowed to show how a water-power may be improved,⁹ nor that improvements could be made if a franchise were obtained,¹⁰ nor that a ravine affords the best route to coal-fields owned by other persons,¹¹ nor that a new building,

¹ *Currie v. Waverly & N. Y. B. R., etc. R.*, 5 Pa. C. C. 634; *Scott v. Indianapolis & V. R.*, 10 Am. & Eng. Ry. 52 N. J. L. 381.

² *Hooker v. Montpelier & W. R. R.*, Cas. 189; *Everett v. Union Pacific R.*, 59 Iowa, 243.

³ *Matter Dep't Public Parks*, 53 Hun, 280.

⁴ *Schuylkill River, etc. R. v. Stocker*, 128 Pa. 233.

⁵ *Munkwitz v. Chicago, M. & S. P. R.*, 64 Wis. 403; *New York, L. & W. R.*, 33 Hun, 639; *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

⁶ *Powers v. Hazelton & L. R.*, 33 Ohio St. 429; *San Diego Land, etc. Co. v. Neale*, 88 Cal. 50; *Omaha Belt R. v. McDermott*, 25 Neb. 714.

⁷ *New Britain v. Sargent*, 42 Conn. 137; *Dorian v. East Brandywine & W. R.*, 46 Pa. 520. See *Salma R. & D. R. v. Keith*, 53 Ga. 178.

⁸ *Burt v. Wigglesworth*, 117 Mass. 302; *Tallman v. Met. El. R.*, 121 N. Y. 119. See also *Harris v. Schuylkill River, etc. R.*, 141 Pa. 242; *Clark v. Pennsylvania R.*, 145 Pa. 438; *Calumet River R. v. Moore*, 124 Ill. 329.

⁹ *Pennsylvania S. V. R. v. Cleary*, 125 Pa. 442; *Myers v. Schuylkill River*, 429.

¹⁰ *Central Pacific R. v. Pearson*, 35 Cal. 247. See *Patterson v. Boom Co.*, 3 Dill. 465; *Blaney v. Salem*, 35 N. E. Rep. 858 (Mass. 1893).

¹¹ *Powers v. Hazelton R.*, 33 Ohio St. 429.

substituted for the one destroyed, would have a larger rental value.¹ The mere intention of the owner to improve his property has no bearing on its market value.²

The fact that it is within the power of a landowner to use his property to the injury of a neighboring public work cannot be considered as increasing its value, when it is condemned for the purpose of extending the work. Thus, where a water company built a filter gallery, and afterwards condemned adjoining land, the owner was not allowed to show that by digging wells on the land in question the supply of water in the gallery could be diminished.³

It has been intimated that the future use in question must be immediately probable;⁴ but this does not seem essential, for realization may be quite distant, indeed may never occur, and yet the probability may be sufficiently strong to be a real factor of present value.

§ 247. If present adaptability to future use is established, it is an inherent factor of value. It is in nowise depreciated by the circumstance that the land is condemned for the very purpose for which it is fitted.⁵ Thus, in *San Diego Land Company v. Neale*,⁶ it was decided that land adapted to the purpose of a reservoir site, should be valued in respect to such adaptability when actually condemned for a reservoir.⁷ This ruling was dissented from on the ground that it admitted an enhancement of property by the very condemnation of it. Now it is true that expropriators must pay the market value of land, not its peculiar value to themselves in view of the use they intend to make of it;⁸ but this rule is not violated in the case cited, for, if we suppose the land to be condemned for a railroad, its adaptability

¹ *Philadelphia v. Linnard*, 97 Pa. 242. ⁵ *Boom Co. v. Patterson*, 98 U. S. 403; *Boston, H. T. & W. R.* 22 Hun,

² *Twin Lakes, etc. Co. v. Colorado* 176; *New York, L. & W. R.*, 27 Hun, Mid. R., 16 Col. 1; *Tallman v. Met. El.* 116; *Currie v. Waverly & N. Y. B. R.*, Ry., 121 N. Y. 119; *Goodwine v. Evans*, 52 N. J. L. 381; *Harrison v. Young*, 9 33 N. E. Rep. 1031 (Ind. 1893). See Ga. 358. See *Moulton v. Newbury* also *Ramsey v. New York & N. E. R.*, port Water Works Co., 137 Mass. 136 N. Y. 543. 163.

³ *Gardner v. Brookline*, 127 Mass. 358. ⁶ 78 Cal. 63.

⁴ *Watson v. Milwaukee & M. R.*, 57 Wis. 332. ⁷ See *Alloway v. Nashville*, 88 Tenn. 510.

⁸ See § 234.

for a reservoir would be considered. It has been held that where land is crossed by the roadbed of an abandoned railroad, and a company wish to condemn for a new railroad, the owner cannot have the value of his land increased by reason of the existence of the abandoned works.¹ But there seems to be no good reason for taking such a case out of the rule. The abandoned works belong to the owner,² and, while useless in his hands, should enure to his profit rather than to the profit of a corporation seeking his land; and it has been so held.³

§ 248. **Anticipatory Effect of the Use in question on Market Value.**—The projection of a public work may affect the market value of land within range of its probable location or influence. Where the value of land in a particular locality is enhanced by the anticipated construction of an undertaking, a railroad for example, it has been held that the owner of a tract actually condemned may profit by the general enhancement.⁴ But the enhancement must be strictly anticipatory. The land taken must not be valued as if the benefit were realized, for, as has been said, "land is not increased in value to the owner by a public improvement which can only be effected by depriving him. One cannot claim damages for the loss of a benefit or profit which, from the very nature of the case, he could never have received or enjoyed."⁵

It has been held that the market value of land may be enhanced solely because the exigencies of a particular public use are likely to demand its acquisition. Thus, where land was condemned for a reservoir, and subsequently adjoining land was condemned for the same use, the owner of the latter was allowed to prove that it had increased in value because of the probability that it would be needed for the extension of the works.⁶ When

¹ *Black River & M. R. v. Barnard*, 474; *Cobb v. Boston*, 112 Mass. 181; 9 Hun, 104. *Texas & S. L. R. v. Cella*, 42 Ark. 528;

² See § 221.

³ *Cohen v. St. Louis, F. S. & W. R.*, 34 Kan. 158. See also *Trimmer v. Pennsylvania, P. & B. R.*, 55 N. J. L. 46. *Giesy v. Cincinnati, W. & Z. R.*, 4 Ohio St. 308.

⁴ *Grand Rapids, L. & D. R. v. Chesebro*, 74 Mich. 466. See also *Aepinwall v. Chicago & N. R.*, 41 Wis. 567. ⁵ *Dorgan v. Boston*, 12 Allen, 223. See also *Union Depot Co. v. Brunswick*, 31 Minn. 297; *Benton v. Brookline*, 151 Mass. 250. See § 285.

⁶ *Stafford v. Providence*, 10 R. I. 567.

property depreciates in anticipation of an undertaking, it seems that the expropriators cannot benefit by this depreciation in the assessment of compensation. In such case the market value should be estimated as of the time just preceding depreciation. Still less can a corporation benefit by a depreciation of land due to its own wrong. Hence, where a railroad company unlawfully occupied land, and afterwards condemned it, the court refused to receive evidence of depreciation due to the trespass.¹ In estimating the compensation due on account of the construction of an elevated railway in a street, the market value of the land as depreciated by the railway is not the basis of assessment. The land should be valued as if the railway had not been built.²

§ 249. **Drawbacks to the Value of Property.** — As the owner may marshal all the elements which tend to enhance the market value of his property, so the expropriators may set out such facts as will tend to lessen this value. When a public work has been already constructed on the tract in question the consequent depreciation in value may be shown.³ Thus, where a water company diverts water from a mill, and afterwards a railroad is so constructed as to destroy entirely the water-power of the mill, the railroad company should pay for the destruction of a power already diminished.⁴ If the property is in bad condition, or naturally insecure, the fact may be shown.⁵ Thus, it may be shown that a stream diverted by the expropriators is so fouled by sewage from a town as to be worthless for the watering of stock,⁶ and, although sewage is unlawfully discharged upon land, the effect may be shown.⁷ Where compensation is claimed for flooding, the natural subjection of the land to flood may be shown.⁸ Thus, in assessing compensation for the taking of a

¹ *Lyon v. Green Bay & M. R.*, 42 Wis. 539.

² *Pappenheim v. Met. El. R.*, 128 N. Y. 436.

³ *Thompson v. Seaboard & W. R.*, 81 Me. 40; *Chicago, B. & N. R. v. Bowman*, 122 Ill. 595. See also *Union R. v. Moore*, 80 Ind. 458.

⁴ See *Lycoming Gas, etc. Co. v. Moyer*, 99 Pa. 615.

⁵ *Dupuis v. Chicago & N. W. R.*, 115 Ill. 97.

⁶ *Kiernan v. Chicago, S. F. & C. R.*, 123 Ill. 188. See also *Pennsylvania S. V. R. v. Keller*, 20 W. N. C. (Pa.) 125; *Whitman v. Boston & M. R.*, 7 Allen, 313.

⁷ *Harris v. Schuylkill River, etc. R.*, 141 Pa. 242.

⁸ *Enos v. Chicago, S. P. & K. R.*, 78 Iowa, 28.

bridge, the jury may take into consideration its liability to be destroyed by flood or ice.¹ But it has been held that a city cannot escape liability for flooding land with surface-water, by proving that surface-water flows in from another source.² A house uncompleted, and fallen into a state of dilapidation, must nevertheless be taken into account in assessing compensation.³

Where a railroad company condemn the property of a canal company, they cannot urge the insolvency of the latter, and the abandonment of the canal, in depreciation of the property taken. This must be valued in the light of its most profitable use.⁴ Where compensation is claimed for an injury to a right of fishery, it may be shown that the fishery is practically worthless.⁵ Where a toll-bridge is condemned, it may be shown that the value of the franchise to take tolls is lessened by the use of a neighboring free bridge.⁶ Evidence that intoxicating liquor is sold upon the premises should not be received, as it might tend to prejudice the jury.⁷

§ 250. There may be legal restrictions on the use of property which lessen, perhaps destroy, its market value.⁸ If the owner of land is obliged to use it for a certain purpose, it must be valued solely with reference to the defined use. Thus, where land, which could be used for a cemetery only, was taken for a road, it was held to have no secular value.⁹ Land may be decreased in value by a building restriction.¹⁰ A restriction depending on the will of the owner has no bearing on market value. Thus, where land was devoted by a bishop to purposes of sepulture, an attempt to value it as simply a burying-ground was successfully resisted, as there was nothing to prevent its being placed

¹ *Mifflin Bridge v. Juniata County*, 144 Pa. 365. See also *Sunderland Bridge*, 122 Mass. 459.

² *Soule v. Passaic*, 47 N. J. Eq. 28. See also *Noonan v. Albany*, 79 N. Y. 470.

³ *Alexander v. Crystal Palace R.*, 30 Beav. 556.

⁴ *Goodin v. Cincinnati & W. Canal*, 18 Ohio St. 169.

⁵ *Tinicum Fishing Co. v. Carter*, 90 Pa. 85.

⁶ *Lock Haven Bridge v. Clinton County*, 27 Atl. Rep. 726 (Pa. 1893).

⁷ *Brown v. Providence & W. R.*, 5 Gray, 35.

⁸ *Tobey v. Taunton*, 119 Mass. 404; *Whitaker v. Phoenixville*, 141 Pa. 327.

⁹ *Stebbing v. Met. Bd. of Works, L. R.* 6 Q. B. 37. See *Hilcoat v. Bird*, 10 C. B. 327.

¹⁰ *Allen v. Boston*, 137 Mass. 819.

on the market.¹ Where a ferry across an interstate river is operated by two persons under agreements made from time to time, each having a franchise from his own State, and the franchise of one is affected by the eminent domain, it is proper, in assessing compensation, to consider the fact that the substantial enjoyment of the franchise depends on arrangements made with the ferryman on the other shore.²

Where land is subjected to an easement its value may be decreased.³ Indeed, the easement may be so exclusive as to deprive it of any market value. Thus, it has been held that where one railroad crosses another the owner of the land has no title to compensation.⁴ But if the new use is held to impose an additional burden on the fee,⁵ the land is to be valued as property already subjected to an easement.⁶

The fact that property cannot be sold at the time when it is desired for public use, because of the incapacity of the owner, does not trammel the eminent domain.⁷ Market value is to be ascertained as if the power of alienation existed. So, although a disputed or clouded title may reduce or destroy market value, the property, when condemned, must be valued as if these drawbacks did not exist, and the money should be paid into court for the lawful owner.⁸

§ 251. The expropriators may have, already, a right or easement in the property in question which, upon a formal condemnation, will affect the compensation.⁹ For example, where land dedicated for a street is formally opened by the public authorities, the abutting owner is at best entitled to nominal compensation.¹⁰ And even nominal compensation has been denied.¹¹ A dedication must be clearly proved in order to affect

¹ *Chicago, E. & L. S. R. v. Roman Catholic Bishop*, 119 Ill. 525. See *Albany St.*, 11 Wend. 149.

² *Columbia Delaware Bridge v. Geisse*, 38 N. J. L. 39.

³ *Fitz v. Nantasket Beach R.*, 148 Mass. 35.

⁴ *Lake Shore & M. S. R. v. Chicago & W. L. R.*, 100 Ill. 21. See § 277.

⁵ See § 162.

⁶ *Chapman v. Oshkosh R.*, 33 Wis. 629.

⁷ See § 301. ⁸ See § 299.

⁹ *Miller v. Newark*, 35 N. J. L. 460.

¹⁰ *Furman St.*, 17 Wend. 649; *Matter of Brooklyn*, 73 N. Y. 179; *Stetson v. Bangor*, 73 Me. 357; *Walker v. Manchester*, 58 N. H. 438.

¹¹ *Clark v. Elizabeth*, 37 N. J. L. 120. See also *Berks St.*, 15 Phila. 381; *Valentine v. Boston*, 22 Pick. 75.

compensation.¹ It has been held that where a dedication has not been accepted by the authorities they cannot treat the land as a street, but must take it on payment of full value,² but evidence of an unaccepted dedication has been received as tending to reduce compensation.³ It has been recently decided that where a city condemned the fee of a strip of land long used as a street, but never formally dedicated, the owners were entitled to more than nominal compensation, because of the loss of the fee.⁴ Where a landowner writes to the municipal authorities offering to relinquish certain land to them, provided they will use it for widening a street, and the land is accepted, and used for this purpose, the owner cannot treat his letter as a mere proposal, and obtain compensation. The letter was the first step in an agreement which the city completed by complying with its conditions.⁵

Where the authorities proceed to condemn land for a street, they cannot assert that it has been dedicated. The institution of proceedings is so definite a recognition of a private property in the land that the authorities are estopped from controverting it.⁶

Is Market Value the Only Standard?

§ 252. The market value of property is usually the basis of assessment. All property is supposed to have a value in the market, and an instruction to a jury, calculated to produce a contrary impression in respect to the property in question, has been held improper.⁷ But it has been said, that where a railroad is carried across another the land occupied has no market value, strictly speaking, but a value for railroad uses only.⁸ It has been said that the basis of assessment may be less than market value,⁹ but this statement is not to be taken literally.

¹ *Pitts v. Baltimore*, 73 Md. 326; *v. Steyner*, 135 N. Y. 341. See *Chicago Jersey City v. Sackett*, 44 N. J. L. 428; *v. Wright*, 69 Ill. 318. *Wayne Ave.*, 124 Pa. 135.

⁷ *Chicago & E. R. v. Jacobs*, 110 Ill.

² *Detroit v. Beecher*, 75 Mich. 454. 414.

See also *Brooklyn St.*, 118 Pa. 640.

³ *Brooklyn Heights*, 48 Barb. 288.

⁴ *Buffalo v. Pratt*, 131 N. Y. 293.

⁵ *Crockett v. Boston*, 5 Cush. 182.

⁶ *Princeton v. Templeton*, 71 Ill. 68,

San José v. Freyschlag, 56 Cal. 8; *Olean*

⁸ *Chicago & N. R. v. Chicago & E. R.*, 112 Ill. 589. See also *Montgomery County v. Schuylkill Bridge*, 110 Pa. 54; *Illinois Cent. R. v. Chicago*, 141 Ill. 509.

⁹ *May v. Boston*, 158 Mass. 21.

The court did not hold that property might be valued at less than its worth. The question was as to the date of valuation.¹ An easement in land may be condemned, and yet it may be impossible to show that the market value of the land is depreciated. This, not because the benefit of the undertaking offsets its burden, but because the easement acquired is insignificant. Yet there is a taking of property for public use, and the owner is entitled to some compensation.²

§ 253. Where land is condemned compensation has been allowed on principle, or in obedience to a statutory command, in respect to matters wholly irrelevant to market value, such as loss incident to enforced removal and interruption of business.³ In *Eagle v. Charing Cross Railway Company*,⁴ the umpire awarded compensation for injury to trade due to diminution of light, but added that the salable value of the premises was not diminished. The company insisted that, in view of this finding, no compensation was due, as no interest in land was taken. The court held that the plaintiff was not called upon to sell, but was entitled to the award as an occupant carrying on business. It has been decided, in other cases, that the owner should not be allowed to recover in respect to inconvenience in removing business,⁵ cost of removing property,⁶ or damage to personal property.⁷ Thus, where a firm of lithographers, lessees of the premises condemned, offered to prove that the expense of removing their presses and other machinery would exceed twenty-five hundred dollars, the evidence was refused.⁸

The issue presented by these conflicting opinions is somewhat

¹ See § 285.

Barb. 151; Dep't Public Parks, 53 Hun,

² *Smith v. Atlanta*, 17 S. E. Rep. 280.
981 (Ga. 1893).

⁴ L. R. 2 C. P. 638.

³ *Chicago, M. & S. P. R. v. Hock*,
118 Ill. 587; *Atchison, T. & S. F. R. v.*
Schneider, 127 Ill. 144; *Robb v. Mays-*
ville & M. S. R., 3 Met. (Ky.) 117;
Covington, etc. R. v. Piel, 87 Ky. 267;

⁵ *Cobb v. Boston*, 109 Mass. 438.

Patterson v. Boston, 23 Pick. 425;
Comm. v. Moesta, 91 Mich. 149; *Chi-*
cago, S. & C. R. v. McGrew, 104 Mo.
282; *Jubb v. Hull Dock Co.*, 9 Q. B.

⁶ *Cent. Pacific R. v. Pearson*, 35 Cal.
247; *New York Cent. & H. R. R.*, 35
Hun, 306; *Ranlet v. Concord R.*, 62
N. H. 561.

See also Chicago & A. R. v. Smith, 17 Ill.
App. 58.
⁸ *New York, W. S. & B. R.*, 35 Hun,
443. See also *Poughkeepsie R.*, 63

⁷ *Gile v. Stevens*, 13 Gray, 146. See
633.

difficult. The strict rule certainly shuts out loose evidence which might tend to embarrass the judgment of the tribunal. On the other hand, a conservative application of the liberal rule will permit the tribunal to consider real injuries suffered by the owner as the direct result of condemnation. It has been said, in explanation of the liberal rule, that where land is condemned the compensation must be assessed as in a case of trespass for expulsion, in which the trespasser is bound to make good all losses sustained.¹

COMPENSATION WHERE PART OF A TRACT IS CONDEMNED.

§ 254. The subject of compensation has been considered hitherto in its simplest phase,—the value of what is actually taken for public use. The principles set out are elementary, and apply whether the whole or a part of a tract is occupied. Now it has been shown that the condemnation of a part of a tract² is a taking of the whole, so far as it affects the part remaining.³ When this is the case, as it usually is, there is a new condition. Compensation must be assessed in respect to the whole tract, and the continued use of part of it by the owner. There are several general rules laid down for assessment of compensation in such cases. Where the part taken and the part remaining are to be valued separately,⁴ the measure of compensation is the market value of the part taken, and the decrease in the market value of the part remaining.⁵ Where the property is to be valued as a whole,⁶ it has been held that compensation is the difference between the market value of the whole tract before the taking, and the market value of the residue.⁷ Although this method of valuation will usually give true results, the more comprehensive method is to measure compensation by the decrease in the market value of the whole tract due to the taking of a part.⁸ But where general benefits are not

¹ See *Ricket v. Met. R.*, 5 B. & S. 156. See § 136.

² See §§ 189–190.

³ See § 136.

⁴ See § 272.

⁵ *Chicago, P. & S. L. R. v. Eaton*, 136 Ill. 9; *Weyer v. Chicago, W. & N. R.*, 68 Wis. 180; *Elizabethtown & P. R. v. Helm*, 8 Bush, 681.

⁶ See § 272.

⁷ *New York, L. & W. R. v. Arnot*, 27 Hun, 151.

⁸ *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. 411; *Setzler v. Pennsylvania*, 112 Pa. 56; *Doud v. Mason*, 76 Iowa, 438.

taken into account,¹ the rule must be so applied as to exclude them.²

§ 255. In order to appreciate the effect of an undertaking upon the remainder of a tract, attention must be first paid to its plan of construction, and, in certain cases, to the manner of its operation.³ Where compensation precedent is required, and the petition does not set out the plan,⁴ the undertaking will be presumed to be properly constructed in such a way as will serve its purposes.⁵ Where the plan is given the effect can be more accurately determined, and where compensation subsequent is permitted, or condemnation takes place after entry,⁶ the tribunal of assessment has frequently before it a completed work with all its effects in evidence.

Where there are several lawful methods of operation, and the promoters stipulate to use those that will inflict the least injury to property, the stipulation should be considered in estimating the injury to the remainder of a tract. Thus, where a railroad company authorized to operate a steam railroad in the usual way, and for the usual purposes, lawfully engage to use no soft coal, to equip their trains with the best appliances for the diminution of smoke and noise, and to carry no freight, the stipulations may be given in evidence.⁷ Where an undertaking is built on a certain plan, its promoters cannot reduce compensation by alleging that a less injurious mode of construction may be adopted in future. Thus, a corporation, having built a railroad on a street above grade, is estopped from asserting that the city may compel it to lower its tracks to the street level.⁸

Where a corporation condemns part of a tract, and makes an agreement with the owner in respect to something to be done on the remainder, the transactions have been treated as independent,

¹ See § 269.

² *Packard v. Bergen Neck R.*, 54 N. J. L. 229.

³ *Nason v. Woonsocket, etc. R.*, 4 R. I. 377; *Cummins v. Des Moines & S. L. R.*, 63 Iowa, 397; *Kansas City & E. R. v. Kragelo*, 32 Kan. 608.

⁴ See § 327.

⁵ *Packard v. Bergen Neck R.*, 54 N.

J. L. 553.

⁶ See § 118.

⁷ *Lieberman v. Chicago, & S. S. R.*, 141 Ill. 140.

⁸ *Ealich v. Mason City & F. D. R.*, 75 Iowa, 443.

so far as the assessment of compensation is concerned.¹ Thus, where a right of way is condemned, and the corporation erects a bulkhead on the remainder of the tract, by consent, the increased value of the land with the bulkhead upon it is not to be considered in assessing compensation.² A railroad company condemned land, and made a special agreement with the owner to pay for the removal and restoration of a building. It was held that the expense incurred should not enter into the compensation.³

Injuries to the Remainder of the Tract.

§ 256. At the outset of the present inquiry, it should be noted that the distinction between a taking and an injurious affecting of property is of little moment, if any, where a part of a tract is condemned. As has been shown, the construction of a *taking* is extremely liberal in such a case,⁴ and the compensation may be based on elements of damage which would be disregarded if the property were untouched by the works.

As a rule, evidence of the effect of the undertaking upon property other than that in question would probably be deemed irrelevant. But it has been held that one may support an allegation of injury to property abutting on a street, caused by the operation of a railroad therein, by proving the effect on similar property,⁵ and the effect on the street as a business thoroughfare.⁶

§ 257. *Injuries due to the Construction of Works.* — The severing of a tract by the condemnation of a part, is a prolific cause of injury. The value of the tract may be lessened by reason of its division into sections of inconvenient shape, size, or location,⁷ and the parts left may be so worthless that the tribunal will be justified in awarding the value of the whole

¹ See *Merriam v. Meriden*, 43 Conn. 173.

² *Harris v. Schuylkill River, etc. R.*, 141 Pa. 242.

³ *Sherwood v. St. Paul & C. R.*, 21 Minn. 122.

⁴ See § 136.

⁵ *Doyle v. Manhattan El. R.*, 128 N. Y. 488.

⁶ See *Drucker v. Manhattan El. R.*, 106 N. Y. 157; *Doyle v. Manhattan El. R.*, 128 N. Y. 488.

⁷ *Bangor & P. R. v. McComb*, 60 Me. 290; *Albany Northern R. v. Lansing*, 16 Barb. 68; *Brooks v. Davenport & S. P. R.*, 37 Iowa. 99; *Chicago & I. R. v. Hunter*, 128 Ind. 213; *Missouri Pacific R. v. Hays*, 15 Neb. 224.

tract.¹ Where a street is opened across a tract over which another street is already laid out, but not opened, it has been held that the owner cannot obtain compensation for the effect of both streets. The damage caused by the latter can be estimated only upon its being formally opened.² Severance may cause depreciation by impairing or destroying access to the tract,³ by interfering with the freedom of communication between its parts,⁴ or by cutting off access to water.⁵ It has been held that where a farm is cut by a railroad, the fact of its being thrown open, in a measure, may be considered in assessing compensation.⁶ The obstruction of the flow of surface-water is an injury referable to construction.⁷

§ 258. *Injuries due to the Operation of Works.* — The courts of New York held, at one time, that only such disadvantage to the remainder of a tract as could be traced to the construction of the undertaking should be considered; that apprehensions of inconvenience and danger from its operation were too remote.⁸ This rule was afterwards disapproved in a case where compensation was allowed for the risk of fire,⁹ but was reaffirmed in an elevated railway case.¹⁰ Very recently the original view was approved on principle, for the reason that where a corporation is not allowed to assert benefits it should not be responsible for disadvantages, but the point was said to be unsettled.¹¹

The question as to the effect of apprehension of future injury on present market value is a difficult one. In *Essex v. Local*

¹ *Grand Rapids v. Luce*, 92 Mich. 92. See §§ 191-192. *Iowa*, 613; *St. Louis, J. & S. R. v. Kirby*, 104 Ill. 345. See also *Emmons v. Minneapolis & S. L. R.*, 38 Minn. 215. But

² *Negley Ave.*, 146 Pa. 456. ³ *Grand Rapids, L. & D. R. v. Chesebro*, 74 Mich. 466; *Drury v. Midland R.*, 127 Mass. 571; *North. Pacific R. v. Reynolds*, 50 Cal. 90. See also *Philadelphia v. Linnard*, 97 Pa. 242. ⁴ *Tucker v. Massachusetts Cent. R.*, 118 Mass. 546; *McReynolds v. Burlington & O. R. R.*, 106 Ill. 152; *Pittsburgh, V. & C. R. v. Bentley*, 88 Pa. 178.

⁵ *Walker v. Old Colony & N. R.*, 103 Mass. 10; *Pflegar v. Hastings & D. R.*, 28 Minn. 510. ⁶ *Albany Northern R. v. Lansing*, 16 Barb. 68; *Union Village v. Johnsonville R.*, 53 Barb. 457. ⁷ *Utica, C. & S. V. R.*, 56 Barb. 456.

⁸ *Readington v. Dilley*, 24 N. J. L. 209. ⁹ *New York El. R.*, 36 Hun, 427. ¹⁰ *Am. Bank Note Co. v. New York El. R.*, 129 N. Y. 252.

¹¹ *Hartshorn v. B. C. R. & N. R.*, 52

Board of Acton,¹ Lord Chancellor Halsbury, referring to a *dictum* of Lord Hardwicke, that "the fears of mankind, though they may be reasonable ones, will not create a nuisance,"² questioned the accuracy of the report,³ but at all events disapproved the principle, saying, "It is quite clear that that is not now the law if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance."⁴ But the Lord Chancellor said further, "I should hesitate very much to affirm the proposition that a belief in imaginary injury, though in fact an existing belief and in fact affecting the marketable value of property, furnished any ground either for damages in an action, or for compensation under the Lands Clauses Act."

§ 259. Where a railroad is laid over a tract, the risk of fire from its careful operation is frequently considered in estimating the compensation. Some decisions hold that the risk must be imminent.⁵ A broader view is taken in decisions which do not insist upon the imminence of the risk, but simply require evidence of depreciation on account of it.⁶ Although evidence of an increased rate of insurance has been received as tending to prove the risk,⁷ the cost of insurance should not be made a special item of compensation.⁸ Although a railroad corporation is made liable by statute for damage by fire, whether due to negligence or not, the owner of land taken for the railroad may still have compensation assessed with reference to the risk. Although fire may never occur, there is the apprehension of it, and an increased rate of insurance on account thereof. If it occur, there is the possibility that the corporation may not be financially respon-

¹ 14 App. Cas. 153.

² Anon. 3 Atk. 751.

³ The words are not reported in s. c. *sub nom.*, Baines v. Baker, Amb. 158.

⁴ See also the judgments of Lords Watson and Macnaghten, in the same case.

⁵ Hatch v. Cincinnati & I. R., 18 Ohio St. 92; Adden v. White Mts. etc. R., 55 N. H. 413. See also Wilmington & R. R. v. Stauffer, 60 Pa. 374; Proprietors of Locks, etc. v. Nashua & L. R., 10 Cush. 385.

⁶ Chicago, S. & C. R. v. McGrew, 104 Mo. 282; Somerville & E. R. v.

Doughty, 22 N. J. L. 495; Pingrey v. Cherokee & D. R., 78 Iowa, 438; Kansas City & E. R. v. Kregelo, 32 Kan. 608; Chicago, P. & S. R. v. Aldrich, 134 Ill. 9.

⁷ Cedar Rapids, I. F. & N. R. v. Raymond, 37 Minn. 204; Stockport R., 33 L. J. Q. B. 251.

⁸ See Ealich v. Mason City & F. D. R., 75 Iowa, 443.

sible. For these and other reasons the statutory liability of the corporation does not efface the effect of risk on market value, though it mitigates it.¹

§ 260. Evidence of the following results of the operation of works has been received as tending to show depreciation in value, — smoke,² noise,³ vibration,⁴ and noxious or disagreeable odors.⁵

The courts have been called upon to consider effects of operation of not so pronounced a character as those just mentioned. The owner of land has been permitted to show that the operation of a railroad would endanger the lives of persons,⁶ and affect horses and other live stock.⁷ It has been held that loss of privacy may be shown, as tending to depreciate value.⁸

§ 261. **Damage to the Use of Property.** — The injuries under this head are referable, of course, to construction or operation, and might have been noted before. But it seems advisable to shift the point of view, in order to emphasize the proposition that where part of a tract is taken, any interference with the use which has been made of the whole must be considered in estimating the compensation.⁹ Thus, a miller may show loss of

¹ *Pierce v. Worcester & N. R.*, 105 Mass. 199; *Adden v. White Mts. R.*, 55 N. H. 413; *Bangor & P. R. v. McComb*, 60 Me. 290.

² *Weyer v. Chicago, W. & N. R.*, 68 Wis. 180; *Ft. Worth & N. O. R. v. Pearce*, 75 Tex. 281. See *New Orleans, &c. R. v. Barton*, 43 La. An. 171.

³ *Chicago, P. & S. L. R. v. Nix*, 137 Ill. 141; *Ft. Worth & N. O. R. v. Pearce*, 75 Tex. 281; *Weyer v. Chicago, W. & N. R.*, 68 Wis. 180; *Omaha South. R. v. Beeson*, 54 N. W. Rep. 557 (Neb. 1893). See also *Bucclench v. Met. Bd. of Works*, L. R. 5 H. L. 418. But see *Am. Bank Note Co. v. New York El. R.*, 129 N. Y. 252.

⁴ *New York Cent. & H. R. R.*, 15 Hun, 63. See also *Bucclench v. Met. Bd. of Works*, L. R. 5 H. L. 418. But see *Am. Bank Note Co. v. New York El. R.*, 129 N. Y. 252.

⁵ *Essex v. Local Board*, 14 App. Cas. 153. See also *Pasadena v. Stimson*, 91 Cal. 238. Compare *Stewart v. Rutland*,

58 Vt. 12; *Eames v. N. E. Worsted Co.*, 11 Met. 570; *Badger v. Boston*, 130 Mass. 170.

⁶ *Chicago, S. F. & C. R. v. McGrew*, 104 Mo. 282; *Somerville & E. R. v. Doughty*, 22 N. J. L. 495. See also *West. Pennsylvania R. v. Hill*, 56 Pa. 460. See *McReynolds v. Burlington & O. R.*, 106 Ill. 152.

⁷ *Railroad Co. v. Combs*, 51 Ark. 324; *Baltimore & O. R. v. Thompson*, 10 Md. 76; *Chicago, P. & S. R. v. Aldrich*, 134 Ill. 9; *Somerville & E. R. v. Doughty*, 22 N. J. L. 495. See *Otoe County v. Heye*, 19 Neb. 289; *West. Pennsylvania R. v. Hill*, 56 Pa. 460; *Chicago, K. & W. R. v. Palmer*, 44 Kan. 110. But see *Jones v. Erie & W. R.*, 151 Pa. 30; *Alabama & F. R. v. Burkett*, 46 Ala. 569; *Troy & B. R. v. Northern Turnpike*, 16 Barb. 100.

⁸ *Bucclench v. Met. Bd. of Works*, L. R. 5 H. L. 418.

⁹ *Tucker v. Mass. Cent. R.*, 118 Mass. 546; *Vicksburg, S. & P. R. v. Dillard*,

custom, not for the purpose of obtaining specific compensation, but to prove depreciation in value.¹

The subject of rental value, as a general indication of market value, has been noticed.² The present question is in respect to depreciation in the rental value of the remainder of a tract as a particular element of compensation. Now where compensation is assessed before entry and construction, the probability of any depreciation in the rental value of the remainder seems to be sufficiently covered by the general principles of assessment. But where compensation is assessed after the construction of the undertaking, so that the effect on the remainder of the tract is more than matter of speculation, a diminution in rental value has been accepted as an independent test of depreciation.³ Where a corporation shows that the rental value of the land has increased since the construction of its undertaking, the owner may show that the rate of increase has not been as great as that of neighboring property.⁴

The fact that the business carried on upon the remainder of the tract may be injured by competition, induced by the undertaking in question, has been deemed irrelevant to the subject of market value.⁵ Though the building of a railroad through one coal field to another may injure the former, by opening up a competing supply, the injury is too remote to be considered.⁶ A tract, over which a way was condemned for a carriage road to the summit of Mount Washington, was used for a hotel and livery stable. The owner was not allowed to have compensation because the opening of the road injured his business of letting saddle horses to those wishing to ascend the mountain.⁷

§ 262. It often happens that the owner of the tract may enjoy its accustomed use, save of course in respect to the part actually

35 La. An. 1045; West. Pennsylvania R. v. Rose, 74 Pa. 362; Varner v. St. R. v. Hill, 56 Pa. 460; St. Louis, J. & S. Louis & C. R., 55 Iowa, 677; Attwood v. R. v. Kirby, 104 Ill. 345; Holt v. Gas Bangor, 83 Me. 582.

Light Co., L. R. 7 Q. B. 728.

⁴ Storck v. Met. El. R., 131 N. Y.

¹ Pittsburgh, V. & C. R. v. Vance, 514.

115 Pa. 325. See Schuylkill Val. Nav. ⁵ Troy & B. R. v. Northern Turnpike Co., 16 Barb. 100.

Co. v. Farr, 4 W. & S. 362.

² See § 244.

⁶ Harvey v. Lackawanna & B. R., 47

³ Norwalk v. Blanchard, 56 Conn. Pa. 428.

461. See also Finch v. Chicago, M. & ⁷ Mt. Washington Road, 35 N. H. S. R., 46 Minn. 250; Pittsburgh, V. & C. 134.

taken, by expending money for the purpose of adapting it to the new conditions. Where such expenditure is necessary for the preservation, not the expansion, of the accustomed use, it should be considered in assessing compensation.¹ The case of *Tyson v. Milwaukee*² illustrates an important proposition in respect to the subject in hand. The city graded a street, and became liable under the statute for injuries inflicted upon abutting lots. The plaintiff sued for the amount which it would cost to fill in the lots to a level with the improved street. The claim was denied on the ground that the filling was not necessary in point of law, that is to say, the market value of the lots was not diminished by the work, as the benefit from the improved street offset the injury. But although an owner receives money to pay for the restoration of his property, he is not bound to expend it for this purpose.³

Owners of a tract partly condemned frequently demand compensation on account of fencing, which they assert is necessary for the protection of the remainder. The demand will be refused where the nature of the public work is such that adjacent land will not be injured by being unenclosed. Thus, compensation should not be allowed for fencing a telegraph right of way.⁴ Again, the property itself may not need the protection of a fence, — for example, where it is unimproved land.⁵ The cost of fencing may be considered where improved land is thrown open by the construction of a railroad,⁶ or a highway.⁷ But it has been held that where the owners of adjoining tracts are not each obliged to maintain half of the division fence, the condemnation of one of the tracts does not entitle the owner of the

¹ *Hartshorn v. Worcester County*, 113 Mass. 111; *Thompson v. Keokuk*, 61 Iowa, 187; *Karst v. St. Paul, S. & T. R.*, 23 Minn. 401.

² 50 Wis. 78.

³ *Chesapeake & O. R. v. Patten*, 6 W. Va. 147. See *Tyson v. Milwaukee*, 50 Wis. 78.

⁴ *Lockie v. Mnt. Un. Tel. Co.*, 103 Ill. 401.

⁵ *New Jersey R. v. Suydam*, 17 N. J. L. 25; *Raleigh & A. R. v. Wicker*, 74 N. C. 220.

⁶ *New York & G. L. R. v. Stanley's Heirs*, 35 N. J. Eq. 283; *Leavenworth, T. & S. R. v. Paul*, 28 Kan. 816; *Pacific Coast R. v. Porter*, 74 Cal. 261; *Texas & S. L. R. v. Cella*, 42 Ark. 528. But see *Alabama & F. R. v. Burkett*, 46 Ala. 569.

⁷ *First Parish, &c. v. Plymouth County*, 8 Cush. 475; *Stone v. Heath*, 135 Mass. 561; *Hagaman v. Moore*, 84 Ind. 496; *Butte County v. Boydston*, 64 Cal. 110; *Readington v. Dilley*, 24 N. J. L. 209; *Hanrahan v. Fox*, 47 Iowa, 102.

other to recover compensation in respect to the maintenance of the whole.¹

Where the construction of the work makes it necessary for the landowner to build a retaining wall, the cost may be taken into account.² Where the statute does not compel a railroad corporation to make farm-crossings, the owner may have the cost of necessary crossings considered in assessing compensation.³ In case access to the premises is obstructed, it has been held that the cost of opening another way may be shown.⁴

§ 263. Where a tract is devoted to a mining, manufacturing, or other industry, and the taking of a part necessitates alterations in the plant, or in the manner of working, the additional expense may be considered in assessing compensation.⁵ In a recent case the plaintiff was the lessee of part of a tract belonging to municipal gas-works. He had erected machinery for distilling the crude tar made by the works, and had contracted with the city to take the daily output. The proximity of the premises to the gas-works was of great advantage, as the tar was drawn from the works directly into the plaintiff's tanks so that there was no expense in obtaining it. The land was condemned by a railroad company which removed the plant. In assessing compensation for the taking of the leasehold, the plaintiff was allowed to show the loss on the machinery, the peculiar value of the premises by reason of their proximity to the works, and the expense incurred in removing the tar elsewhere in order to perform the contract.⁶ Where the occupation of part of a tract destroys something essential to the use which had been made of the whole, it has been deemed proper, in some cases, to consider the cost of

¹ Hoag v. Switzer, 61 Ill. 294; People v. Supervisors, 19 Wend. 102; Kennett's Petition, 24 N. H. 139.

² Patterson v. Boston, 23 Pick. 425; Buell v. Worcester County, 119 Mass. 372; Cincinnati v. Whetstone, 47 Ohio St. 196; Price v. Milwaukee & S. P. R., 27 Wis. 98. See also Drury v. Midland R., 127 Mass. 571. But see Chambers v. South Chester, 140 Pa. 510.

³ Atchison & N. R. v. Gough, 29 Kan. 94. See § 215.

⁴ Brainard v. Missisquoi R., 48 Vt. 107. See also Silver Creek Nav. Co. v. Mangum, 64 Miss. 682. See Gear v.

Dubuque & S. C. R., 39 Iowa, 23. Kersey v. Schuylkill River, etc. R., 133 Pa. 234; Baird v. Schuylkill River, etc. R., 154 Pa. 459; Hannibal Bridge Co. v. Schanbacher, 57 Mo. 582; Chicago, S. & C. R. v. McGrew, 104 Mo. 282.

⁶ Ehret v. Schuylkill River, etc. R., 151 Pa. 158.

duplicating the thing on the part remaining.¹ Thus, the owner of a stock farm, whose training track was destroyed, was given such compensation as would enable him to build a new one.²

The expropriators may offset a claim on account of the destruction of a particular accessory to the use made of the property, by showing that the use may still be subserved by the adoption of other means equally convenient, and not more costly. Thus, where a supply of water is cut off, it may be shown that another can be obtained at less cost.³ But the proposition does not hold where the realization of the alternative suggested depends on the co-operation of other parties. Hence, where the land taken is a part of leased premises used by the lessee as a drying ground in connection with his factory, it cannot be shown that the lessor is willing to lease other land for the same purpose at the same rent.⁴

§ 264. Courts have refused to allow for various charges and expenses due indirectly to the construction or operation of public works,⁵ such as probable assessments for improvements consequent on the opening of a street.⁶

Where the statute declares that it shall be the duty of corporations to construct fences or farm-crossings, or to repair in other ways property injured by their occupation, the owner cannot have compensation assessed on the theory that the expense of construction and repair will fall upon him. If the duty is neglected he may have redress.⁷ When a railroad corporation is not obliged to fence for some months after construction, it has been held that the owner should be indemnified for the lack of protection in the meanwhile.⁸

¹ *Chicago, P. & S. L. R. v. Wolf*, 137 Ill. 360.

² *New York, L. & W. R., 29 Hun*, 1.

³ *Illinois & S. L. R. v. Switzer*, 117 Ill. 399.

⁴ *New York, W. S. & B. R. v. Bell*, 28 Hun, 426.

⁵ *Holton v. Milwaukee*, 31 Wis. 27.

⁶ *Peel v. Atlanta*, 85 Ga. 138; *Lewis v. New Britain*, 52 Conn. 568; *Antoinette St.*, 8 Phila. 461. See also *Cushing v. Boston*, 144 Mass. 317.

⁷ *Chicago, M. & S. P. R. v. Baker*, 102 Mo. 553; *Williams v. School Dist.*,

33 Vt. 271; *Philadelphia, W. & B. R.*

v. Trimble, 4 Whart. 47; *March v.*

Portsmouth & C. R., 19 N. H. 372. See

also *St. Paul & S. C. R. v. Murphy*,

19 Minn. 500; *Jones v. Seligman*, 81 N.

Y. 190

⁸ *St. Louis, J. & S. R. v. Kirby*, 104

Ill. 345.

The practice of inserting expenses as special items of compensation has been approved,¹ but where the object of inquiry is the depreciation in market value, the cost of restoration is not to be conclusively presumed to represent such depreciation.² In other cases, however, especially where the object of inquiry is simply the depreciation in market value, the expenses are not to be itemized, but are to be considered merely as burdens which lessen the value.³

Benefits to the Remainder of the Tract.

§ 265. May losses and disadvantages inflicted upon a tract, part of which is taken, be offset by benefits and advantages conferred upon the remainder? The constitutions, statutes, and decisions of the several States so deal with this question as to create an inharmonious body of law. The constitutions of certain States prohibit the consideration of benefits.⁴ In Mississippi, benefits are refused consideration on principle, for a reason already noted;⁵ and the further objection has been made that their realization may be remote and uncertain.⁶ Where a prohibition against benefits is directed against a particular class, it is to be strictly limited to that class. Hence, under the provision of the California constitution just noted, individuals authorized to condemn a right of way may have benefits considered.⁷ The "municipal" corporations mentioned in the same provision mean public, as distinguished from private, corporations, and therefore include counties.⁸ In some decisions a prohibition

¹ *Price v. Milwaukee & S. P. R.*, 27 Wis. 98. See also *Readington v. Dilley*, 24 N. J. L. 209.

² *Barnett v. St. Anthony Falls Co.*, 33 Minn. 265.

³ *Delaware, L. & W. R. v. Burson*, 61 Pa. 369; *Pittsburgh, B. & B. R. v. McCloskey*, 110 Pa. 436; *Henry v. Dubuque & P. R.*, 2 Iowa, 288.

⁴ No benefits on appropriation of property or right of way by any corporation: *Arkansas*, xii. 9. No benefit on appropriation of right of way by a corporation other than municipal:

California, i. 14; *North Dakota*, i. 14; *Washington*, i. 16. Jury not to consider any advantage to the owner on account of the improvement: *Iowa*, i. 18. No benefits on appropriation of right of way by any corporation: *Kansas*, xii. 4; *South Carolina*, i. 23. No deduction for benefits to any property of the owner: *Ohio*, i. 19.

⁵ See § 225.

⁶ *Isom v. Mississippi Cent. R.*, 36 Miss. 300.

⁷ *Moran v. Ross*, 79 Cal. 549.

⁸ *San José & A. R. v. Mayne*, 83 Cal. 566.

against benefits is thus construed. That part of the tract appropriated is to be paid for at its market value, without deduction on account of any benefit to the residue. The claim for injury to the residue is not viewed as a claim for compensation for a taking, and therefore such injury may be offset by benefits.¹ In other decisions the prohibition in question is held to affect the entire tract, but compensation is declared to be the difference between the market value of the tract before and after condemnation.² This ruling seems open to the criticism that an accurate determination of the difference in market value before and after condemnation necessarily takes into account resulting advantages, as well as disadvantages. This criticism has been noted, but dismissed with the rather unsatisfactory statement that juries do not generally consider benefits when they ascertain market value in this way.³ The practical result of this method of valuation seems to be that, while evidence of benefits cannot be received, the tribunal of assessment may be in fact influenced by evident advantages.

In most of the other States benefits are allowed in some form or other, unless they are denied or limited by statute.

§ 266. **General Requisites of a Benefit.** — A benefit is an advantage conferred upon property by a public work in behalf of which part of the property has been taken. Hence, where a railroad embankment levees a tract, no part of which was condemned, there is no benefit. The owner cannot recover for the loss of the advantage caused by the substitution of a bridge for the embankment.⁴ The fact that the property in question has been benefited by improvements made by parties other than the expropriators, does not enable the latter to set off such benefits against the burdens for which they are responsible.⁵ A benefit is allowed on the assumption, of course, that it is to be actually

¹ *Augusta v. Marks*, 50 Ga. 612; *Cincinnati & S. R. v. Longworth*, 30 Ohio St. 108; *Shipley v. Baltimore & P. R.*, 34 Md. 336; *Page v. Chicago, M. & S. P. R.*, 70 Ill. 324; *Green v. Chicago*, 97 Ill. 370; *Harwood v. Bloomington*, 124 Ill. 48; *Oregon Cent. R. v. Wait*, 3 Or. 91; *Woodfolk v. Nashville & C. R.*, 2 Swan, 422.
² *Henry v. Dubuque & P. R.*, 2 Iowa, 288.
³ *Leroy & W. R. v. Ross*, 40 Kan. 598.
⁴ *Koch v. Delaware, L. & W. R.*, 53 N. J. L. 256. See also *Wabash, S. L. & P. R. v. McDougall*, 126 Ill. 111.
⁵ *Burcky v. Lake*, 30 Ill. App. 23.

conferred.¹ Hence, where part of a tract was taken for a canal, and the advantage of a waterway to the remainder was held to offset the damage, the fact that the canal was never completed enabled the owner to regain possession, on the ground that his land had been taken without compensation.² No benefit is to be considered unless it affects the very tract in question.³ Thus, where one owned three lots, one of which was included within the lines of a projected street, and the remaining lots were sold at an advance in anticipation of the opening of the street, the city, on actually taking the lot, was not allowed to show the benefits to the other lots.⁴ Where one owning a tract about to be crossed by a street deeded it to his wife, in order that it might be valued without taking into account benefits to adjacent land which he owned, the court declared this fact to be irrelevant. Compensation was assessed with reference to the single tract.⁵ As the landowner is entitled to have his compensation assessed in respect to the injurious effect of the undertaking upon the whole tract,⁶ the expropriators may be allowed to prove benefits within the same area.⁷ In allowing benefits, the tribunal is not restricted to the consideration of the effect produced upon a tract by the section of the public work located upon it, but may consider the work as a whole.⁸

§ 267. The benefit must be one the permanency of which can be fairly assumed, not an advantage depending on the will of the expropriator,⁹ as, for example, a farm-crossing over a railroad, existing by the favor of the company.¹⁰ Where land is crossed

¹ See *Hutt v. Chicago*, 132 Ill. 352. See also *Detroit v. Chaffee*, 68 Mich. 632.

² *Kennedy v. Indianapolis*, 103 U. S. 599.

⁶ See § 136.

⁷ *Shawneetown v. Mason*, 82 Ill. 337.

³ *Meacham v. Fitchburg R.*, 4 Cush. 291; *Buffalo Bayou, B. & C. R. v. Ferris*, 26 Tex. 588; *Todd v. Kankakee & I. R.*, 78 Ill. 530; *Pittsburgh, F. W. & C. R. v. Reich*, 101 Ill. 157; *Philadelphia & R. R. v. Gilson*, 8 Watts, 243; *Paducah & M. R. v. Stovall*, 12 Heisk. 1.

⁸ *Springer v. Chicago*, 135 Ill. 552; *Bohm v. Met. El. R.*, 129 N. Y. 576; *Bookman v. New York El. R.*, 137 N. Y. 302. See also *Burk v. Simonson*, 104 Ind. 173.

⁹ See *Pittsburgh, V. & C. R. v. Rose*, 74 Pa. 362.

⁴ *Whitaker v. Phoenixville*, 141 Pa. 327.

¹⁰ *Old Colony R. v. Miller*, 125 Mass. 1; *Sigafoos v. Minneapolis, L. & M. R.*, 39 Minn. 8.

⁵ *Chaffee's Appeal*, 56 Mich. 244.

by a railroad, evidence of a reduction of freight rates is inadmissible, for there is no assurance that the reduced rates will be maintained.¹ It appears, however, that a benefit is conferred where a canal corporation permits the landowner to use surplus water, and reserves the right to revoke the permission when the needs of the canal will not permit diversion.²

§ 268. Does the fact that a special benefit has been considered in assessing compensation, give the recipient a right of property in its continued existence? Not if the benefit in question is conferred by the public use itself, for it has been shown³ that a private person cannot have an interest in the continuance of a public work. Hence, a street may be vacated, without compensation to the owner of the fee, for the loss of the benefits with which he was charged on its opening.⁴ In such case, the owner is repossessed of his property, and is certainly in no worse position than he who has paid a special tax for the promotion of a public work on neighboring land, and cannot have it refunded on the abandonment of the work.⁵ It has been held, however, that where the special benefit is not dependent on the maintenance of the undertaking it may survive abandonment. Thus, where part of a tract was taken for a canal, and the remainder was leveed by an embankment built on adjoining land, the benefit was considered in assessing compensation. It was held that, after the abandonment of the canal, the embankment could not be freely removed.⁶ As a benefit must not depend on the will of the expropriators,⁷ it follows that, as long as they retain the property condemned, they cannot diminish the owner's compensation by withdrawing benefits in consideration of which the compensation was assessed. It has been held that where land is taken in fee and general benefits are considered, it may be put to other uses, or sold,

¹ *Reading & P. R. v. Balthaser*, 119 Pa. 472. See also *Drury v. Midland R.*, 127 Mass. 571.

² *Miller's Case*, 2 Hill, 418; *Dermott v. State*, 99 N. Y. 101.

³ See § 217.

⁴ *Kean v. Elizabeth*, 54 N. J. L. 462. Compare *Pearsall v. Supervisors*, 74 Mich. 558.

⁵ See *Brooklyn Park Comm. v. Armstrong*, 45 N. Y. 234; *Stout v. Noblesville, etc. Co.*, 83 Ind. 466; *Chicago v. Union Building Ass.*, 102 Ill. 379.

⁶ *Burk v. Simonson*, 104 Ind. 173.

⁷ See § 267.

without liability on account of loss of benefits.¹ A benefit once allowed cannot be reasserted in a further proceeding to condemn. A part of a tract was taken for the approach to a bridge, and, in assessing compensation, the benefit to the remainder from the opening of the bridge was duly considered. An alteration of plan necessitated the condemnation of a second section of the tract. It was held that the benefit in question could not be considered again.²

§ 269. **General Benefits.** — A general benefit is an advantage not peculiar to the remainder of a tract part of which is taken, but conferred by the public work upon all property within range of its utility. It is not to be confounded with that anticipation of future benefit which, in some cases, is accounted a factor of present market value,³ but is an advantage supposed to be realized from a completed work. The allowance of general benefits is sometimes directed by the statute, as, for example, where arbitrators are instructed to consider the increased value given to property by reason of the "construction of the railway" over it.⁴

General benefits have been approved on principle, and seem to be considered wherever a corporation is permitted to show a benefit to the tract in question which is enjoyed by property in the vicinity.⁵ Thus, it has been decided that where the operation of a railway in a street benefits abutting property the fact may be shown, although the net benefit to property on neighboring streets may be greater.⁶ It is argued, in justification of the allowance of general benefits, that the landowner has no right to complain of a valuation which is strictly fair as to his land, although it is based in part upon advantages which are in fact conferred also upon his neighbor.⁷

Evidence of general benefits is frequently excluded on prin-

¹ *Whitney v. State*, 96 N. Y. 240.
See *Burbank v. Fay*, 65 N. Y. 57.

² *McElheny v. McKeesport & D. Bridge*, 153 Pa. 108.

³ See § 248.

⁴ *Credit Valley R. v. Spragge*, 24 Grant's Ch. (Ont.) 231.

⁵ *New Orleans Pacific R. v. Gay*, 31 La. An. 430.

⁶ *Bohm v. Met. El. R.*, 129 N. Y. 576.
In this case Peckham, J., doubts the propriety of distinguishing between special and general benefits.

⁷ See *Young v. Harrison*, 17 Ga. 30; *Henderson & N. R. v. Dickenson*, 17 B. Mon. 173.

ciple.¹ Hence, it may not be shown that the property in question shares in a general advance of property in the locality caused by the construction of a railroad,² or a highway.³ The argument for disallowing general benefits is that otherwise one whose property is taken for a public use would be in effect forced to pay for an advantage which his neighbor would freely enjoy, the amount paid being, of course, the value of the general benefit.

§ 270. **Special Benefits.** — A special benefit is an advantage conferred upon a tract by reason of the maintenance of a public work upon it, — an advantage differing in kind, or at least in great degree, from a general benefit. But it is to be noted, that an advantage is none the less a special benefit because it is conferred upon all the tracts of land upon which the public work is constructed.⁴ Indeed, a benefit may be special, although it is conferred also upon land not taken. Thus, where a street is widened by the condemnation of a strip of land along one side, the owner cannot complain because his remaining land is charged with a benefit which the widening necessarily confers upon lots on the opposite side.⁵ The most marked special benefits are those which improve the physical condition of the land, for example, filling up a canal,⁶ raising a water level, so that ice may be harvested,⁷ making a ditch into which drains may be run,⁸ and open-

¹ *Whitman v. Boston & M. R.*, 7 Va. 693. See also *Eagle v. Charing Allen*, 313; *Whitcher v. Benton*, 50 N. H. 25.

² *Meacham v. Fitchburg R.*, 4 Cush. 291; *Setzler v. Pennsylvania S. R.*, 112 Pa. 56; *Wilmington & W. R. v. Smith*, 99 N. C. 131; *Winona & S. P. R. v. Waldron*, 11 Minn. 515; *Washburn v. Milwaukee & L. W. R.*, 59 Wis. 364; *Adden v. White Mtn. R.*, 55 N. H. 413; *Shipley v. Baltimore & P. R.*, 34 Md. 336; *Adams v. St. Johnsbury & L. C. R.*, 57 Vt. 240; *Wyandotte, K. C. & N. R. v. Waldo*, 70 Mo. 629; *Chicago, K. & N. R. v. Wiebe*, 25 Neb. 542; *Sullivan v. North Hudson County R.*, 51 N. J. L. 518; *Packard v. Bergen Neck R.*, 54 N. J. L. 553; *Railroad Co. v. Tyree*, 7 W.

³ *Mangles v. Freeholders*, 55 N. J. L. 88; *Trinity College v. Hartford*, 32 Conn. 452; *Beekman v. Jackson County*, 18 Or. 283; *Daugherty v. Brown*, 91 Mo. 26; *Arbrush v. Oakdale*, 28 Minn. 61.

⁴ *Donovan v. Springfield*, 125 Mass. 371.

⁵ *Abbott v. Cottage City*, 143 Mass. 521. See also *Allen v. Charlestown*, 109 Mass. 243.

⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133.

⁷ *Paine v. Woods*, 108 Mass. 160.

⁸ *Lipes v. Hand*, 104 Ind. 503. See also *Spear v. Drainage Comm.*, 113 Ill. 632.

ing a public sewer, and thereby relieving a landowner from the duty of maintaining an ancient drain for the benefit of adjacent lands.¹

§ 271. The most common special benefit is that of access to a tract afforded by the construction of a highway over it.² But it has been held that benefits should not be considered where the road is private.³ Although an ordinary steam railroad passing over a tract does not usually benefit it,⁴ it has been held that the building of a station near the tract is a special benefit,⁵ though the probability of the erection of a station has been deemed irrelevant.⁶ The feasibility of connecting industrial works upon the tract with the railroad has been considered a benefit.⁷ It appears that a tract may be specially benefited by opening a canal through it,⁸ and by laying a pipe line for natural gas from which the owner may be supplied.⁹ Where part of a tract was taken in relocating a street, the probability that a part of the old street, lying between the new one and the remainder of the tract, would be joined to the latter, was considered a special benefit.¹⁰

Benefits that are remote or speculative should not be considered.¹¹ Thus, where land owned by a railroad company is taken for a highway, the possible increase of travel on the railroad by reason of the opening of the highway is not a benefit.¹² Evidence that the construction of a railroad will afford a market

¹ French v. Lowell, 117 Mass. 363.

² Trosper v. Comm., 27 Kan. 391; Hire v. Kniseley, 130 Ind. 295.

³ Crater v. Fritts, 44 N. J. L. 374. See also Schehr v. Detroit, 45 Mich. 626.

⁴ See § 269.

⁵ Shattuck v. Stoneham Branch R., 6 Allen, 115. See also Bookman v. New York El. R., 137 N. Y. 302; Pittsburgh & L. E. R. v. Robinson, 95 Pa. 426. But see Washburn v. Milwaukee & L. W. R., 59 Wis. 364.

⁶ Brown v. Providence, W. & B. R., 5 Gray, 35.

⁷ Pittsburgh & L. E. R. v. Robinson, 95 Pa. 426. See also Ranlet v. Concord R., 62 N. H. 561; Colorado Cent. R. v. Humphreys, 16 Col. 34; Russell v. St.

Paul, M. & M. R., 33 Minn. 210. But see Drury v. Midland R., 127 Mass. 571.

⁸ Whitney v. State, 96 N. Y. 240; Eldridge v. Binghamton, 120 N. Y. 309. See also Pennsylvania & N. Y. R. v. Brunnell, 81 Pa. 414.

⁹ See Fisher v. Baden Gas Co., 138 Pa. 301.

¹⁰ Tingley v. Providence, 8 R. I. 493.

¹¹ Friedenwald v. Baltimore, 74 Md. 116; Drury v. Midland R., 127 Mass. 571.

¹² Old Colony & F. R. R. v. County of Plymouth, 14 Gray, 155; State v. Shardlow, 43 Minn. 524. See also Bridgeport v. New York & N. H. R., 36 Conn. 255.

for timber on the tract suitable for cross ties, etc., has been rejected,¹ and so has evidence that a general market will be opened for timber and other natural resources of the land.²

§ 272. **Manner of Allowing Benefits.**— There are two well-defined methods of allowing benefits. The part of the tract actually occupied is valued by itself, and, necessarily, without reference to benefits. Then, upon consideration of benefits and injuries, the decrease, if any, in the market value of the remainder is determined, and added to the first sum. The total amount is the compensation due in respect to the whole tract.³ According to the second method, the tract is valued as a whole, and if benefits are found they offset not only injuries to the remainder, but the loss of the part occupied.⁴ In New York the State or a political corporation may estimate benefits in respect to the whole tract,⁵ but it appears that if a railroad corporation is the actor it must pay full value for the part taken, and can assert benefits only in the valuation of the remainder.⁶

§ 273. The allowance of benefits may effect, in some cases, so just a balance between advantage and disadvantage as to reduce pecuniary compensation to the vanishing point. This logical result is accepted by the courts whether the benefits are set off against the whole tract, or against the remainder only,⁷ though

¹ Childs v. New Haven & N. Co., 104. See also Wichita & W. R. v. 133 Mass. 253. But see Haislip v. Kuhn, 38 Kan. 675.
Wilmington & W. R., 102 N. C. 376.

² Adden v. White Mts. R., 55 N. H. 112 Pa. 56; Long v. Harrisburg, 126 413; Adams v. St. Johnsbury & L. C. Pa. 143. See also Beekman v. Jackson County, 18 Or. 283; Sullivan v. R. 57 Vt. 240. But see Chicago, S. F. & C. R. v. McGrew, 104 Mo. 282.

³ Dulaney v. Nolan County, 85 Tex. 518.

⁴ Genet v. Brooklyn, 99 N. Y. 296; 222; Evansville & R. R. v. Charlton, Eldridge v. Binghamton, 120 N. Y. 33 N. E. Rep. 129 (Ind. 1893); Atlanta v. Georgia Cent. R., 53 Ga. 120; Chicago, K. & N. R. v. Wiebe, 25 309.

⁵ Washington Cemetery v. Prospect Park & C. I. R., 68 N. Y. 591; Newman v. Met. El. R., 118 N. Y. 618; Bohm v. Met. El. R., 129 N. Y. 576.

⁶ Chesapeake & O. Canal v. Key, 3 Cranch C. C. 599; Livingston v. New York, 8 Wend. 85; Betts v. Williamsburg, 15 Barb. 255; Trinity College v. Hartford, 32 Conn. 452; Burkam v. 302; Mitchell v. Thornton, 21 Gratt.

in the latter case the owner receives money, of course, for the part appropriated.

May benefits be estimated higher than injuries, so that the property-owner is not only denied pecuniary compensation, but is made a debtor to the expropriators for the value of the net benefit? Certainly not, where the expropriator is a private person or corporation, for the sum due would be a forced contribution — a tax for private purpose. It may be regarded therefore as settled, that under no circumstances can an owner be obliged to pay money to a private corporation as the result of the condemnation of his property.¹ But where the state or a political corporation condemns land for a use for which the power of special taxation may be exerted, the tax may be laid to the extent of the benefit.² In this case the condemnation of land may be followed by the pecuniary indebtedness of the owner to the expropriator, but the indebtedness is not referable to condemnation, but to taxation.³ It has been held, that where land is taken for a street the assessed compensation cannot be retained by the city and deducted from the tax for benefits.⁴

COMPENSATION FOR PROPERTY DAMAGED OR INJURIOUSLY AFFECTED.

§ 274. Where property untouched by the public work sustains an injury for which there is a common law remedy,⁵ the measure of damages is usually that which obtains in an action of trespass.⁶ But where compensation is prescribed for property damaged, or injuriously affected, and a mode of assessment is provided, it is usually intended that compensation shall be assessed but once, and shall cover all future damage from the cause in question. This is the construction placed upon the Lands Clauses Act,⁷ and upon similar statutes in this coun-

Ohio & M. R., 122 Ind. 344; Wilming- 85; Genet v. Brooklyn, 99 N. Y.
ton & W. R. v. Smith, 99 N. C. 131; 296; Terry v. Hartford, 39 Conn. 286.
Jackson County v. Waldo, 85 Mo. 637. ⁴ McKusick v. Stillwater, 44 Minn.
See also Bohm v. Met. El. R., 129 N. Y. 372. See Fink v. Newark, 40 N. J. L.
576. 11.

¹ See Wilmington & W. R. v. Smith,
99 N. C. 131.

² See § 25.

³ Livingston v. New York, 8 Wend.

⁵ See §§ 146-152.

⁶ See § 311.

⁷ See Holliday v. Wakefield (1891),

A. C. 81, Lord Halsbury. See also

try.¹ And it has been held that, even if a statutory remedy is not provided, full compensation may be recovered in a common-law action.² The injuries under this head are noted elsewhere,³ and it is only necessary to say here, that the measure of compensation is, as a rule, their depreciatory effect on the value of the property.⁴

Where the legislature imposes a peculiar liability upon the public agent,⁵ compensation must be assessed with reference to it. Thus, where a statute declared that the owner of land taken for a street should have full indemnity for the trouble and expense due to the proceedings, evidence of expenses incurred in employing counsel, and conferring with the mayor of the city, was admitted, but evidence of mental worry was held remote.⁶

COMPENSATION IN PARTICULAR CASES.

§ 275. **Personal Property.** — The subjection of personal property to the eminent domain has been considered.⁷ It is only necessary to add, that if such property be condemned, it should be appraised at the market price of similar property, or, in case the object is one of a limited class or unique, expert evidence of its value should be obtained.

§ 276. **Materials.** — Where materials for construction are condemned,⁸ compensation must be assessed with reference to their condition. Where the materials are in a natural state, they are not to be specially valued. Thus, where land is condemned for the stone in it, the quarry price of stone is irrelevant. It should be valued as land containing stone.⁹ It has even been held that in a region where there is no general market for gravel, land from which gravel is taken for ballasting a railroad should be valued as farm land.¹⁰ But where the materials are in marketable

President, etc. of Colac v. Summerfield & R. G. R. v. Downie, 82 Tex. 383. (1893), A. C. 187. See Gregg v. Baltimore, 56 Md. 256.

¹ See § 362.

² See § 309.

³ See §§ 153-157.

⁴ Streyer v. Georgia Southern & F. R., 90 Ga. 56; Montgomery v. Townsend, 80 Ala. 489; Penn Mut. Life Ins. Co. v. Heiss, 141 Ill. 35; Chambers v. South Chester, 140 Pa. 510; Ft. Worth

⁵ See § 158.

⁶ Whitney v. Lynn, 122 Mass. 338.

⁷ See §§ 81, 253.

⁸ See § 77.

⁹ Water Comm. v. Lawrence, 3 Edw. Ch. 552.

¹⁰ Vezina v. The Queen, 17 Can. Sup. Ct. 1.

shape, or developed, a different rule prevails. Thus, where a quarry is opened, the stone should be specially valued.¹ So, materials should be specially valued when they have been actually taken out.²

§ 277. **Occupation of Ways.**—It has been shown that where a way, especially a railroad, is crossed by another way, there is a taking of property, or not, according as the state in authorizing the prior way has not, or has, reserved the right to cross it with another way without compensation.³ Assuming that there is a taking of property, what are the elements of compensation? It has been decided that an allegation of injury to the franchise of operating the railroad is without weight;⁴ and indeed this conclusion is the consequent of the proposition that a right of way may be crossed without special authority,⁵ for such authority is requisite in order to justify the invasion of a franchise. Hence, compensation has been refused on account of the increased inconvenience and expense in operating the railroad, such as stopping trains at the crossing,⁶ maintaining a watchman,⁷ ringing a warning bell,⁸ operating gates.⁹ Nor can compensation be allowed on account of the increased risk of accident.¹⁰ It has been held, that where a railroad is crossed by a railroad or other way, compensation should be assessed in respect to the land.¹¹ On the other hand, the land has been eliminated from the assessment on the ground that it is not really appropriated, but is used in common with the prior corporation, which is damaged only as far as its exclusive use is impaired.¹² Substantial justice may be done under the latter rule, in most cases, for the value of the

¹ See *Water Comm. v. Lawrence*, 3 Edw. Ch. 552.

² *Philadelphia & R. R. v. Gilson*, 8 Watts, 243; *Vermont Cent. R. v. Baxter*, 22 Vt. 365.

³ See § 161.

⁴ *Lake Shore & M. S. R. v. Cincinnati, S. & C. R.*, 30 Ohio St. 604.

⁵ See § 179.

⁶ *Peoria & P. R. v. Peoria & F. R.*, 105 Ill. 110.

⁷ *Massachusetts Cent. R. v. Boston C. & F. R.*, 121 Mass. 124. But see *Flint & P. M. R. v. Detroit & B. C. R.*, 64 Mich. 350.

⁸ *Old Colony & F. R. R. v. Plymouth County*, 14 Gray, 155.

⁹ *Boston & A. R. v. Cambridge*, 159 Mass. 283.

¹⁰ *Old Colony & F. R. R. v. Plymouth County*, 14 Gray, 155; *Bridgeport v. New York & N. H. R.*, 36 Conn. 255.

¹¹ *Old Colony & F. R. R. v. County of Plymouth*, 14 Gray, 155; *Morris & Essex R.*, 9 N. J. L. J. 75, Depue, J. See also *Lockport & B. R.*, 19 Hun, 38.

¹² *Flint & P. M. R. v. Detroit & B. C. R.*, 64 Mich. 350.

land is usually small; but if a railroad corporation has paid a large price for a section of the way which is crossed by another railroad, it seems unfair that the latter corporation should not pay something for land, which, but for the prior location, it would have been obliged to condemn at its full value. Compensation has been allowed for an interference with the business of the corporation whose way is crossed.¹

§ 278. Where two ways, one of which is a railroad, cross each other, permanent improvements are usually necessary in order to make the crossing safe. In some cases, the police power is exerted to compel the proprietors of each way to share the cost of the necessary works.² In other cases, a different course is pursued. Where a highway is laid across a railroad, compensation has been allowed for the erection of necessary fences, cattle-guards, and gates.³

Where a railroad or other corporation is authorized to use the plant of another corporation, and the franchise of the latter is thereby invaded,⁴ compensation should be assessed according to the principles which govern the valuation of franchises.⁵ Where a franchise is not invaded, compensation has been assessed in the form of rent, — either a gross sum,⁶ or so much per car per mile.⁷ In *Metropolitan Railway Company v. Quincy Railway Company*,⁸ the court approved the compensation assessed by the commissioners, which was stated to be “that portion of the profits from passengers carried over the whole or part of both roads, which is derived from carrying them on the road of the Metropolitan Railway Company, or rightly belongs to the business of that road, having regard to the capital and work contributed by each company in the transportation; and also the entire

¹ *Chicago & W. I. R. v. Englewood*, 633; *Kansas City R. v. Jackson County*, etc. R., 115 Ill. 375. 45 Kan. 716.

² *Lake Shore & M. S. R. v. Cincinnati, S. & C. R.*, 30 Ohio St. 604; *New York & N. E. R. v. Waterbury*, 60 Conn. 1. See § 15. ⁴ See § 167. ⁵ See § 244. ⁶ *Louisville City R. v. Cent. Pass. R.*, 87 Ky. 223.

⁷ *Cambridge R. v. Charles River R.*, 139 Mass. 454. See *Canal & C. R. v. Crescent City R.*, 41 La. An. 561. ⁸ 12 Allan, 262.

³ *Comm. v. Mich. Cent. R.* 90 Mich. 385; *Old Colony & F. R. R. v. County of Plymouth*, 14 Gray, 155; *City of Kansas v. Kansas City Belt R.*, 102 Mo.

receipts from passengers carried wholly on that road, allowing to the Quincy Railway Company only the cost of transportation, which must of course be held to include an allowance for the interest on the capital invested in the horses and cars used by that corporation in such transportation of passengers."

INTEREST.

§ 279. When property is taken without prepayment of compensation, there is usually some delay in payment. The delay may be that inseparable from the ascertainment of the amount, or it may be due to the neglect of the expropriators to press the proceedings. In either case, the delay must be compensated for by interest, which thus becomes a part of the award.¹ Substantially the same ruling has been made with respect to compensation under the Lands Clauses Act. The promoters are in the position of an ordinary purchaser under a contract of sale. They are chargeable with interest from the time when they might have prudently taken possession.² Where a jury have been instructed to compute interest on the compensation, and they return a verdict for a gross amount, it has been presumed that interest is included.³ Where compensation is to be assessed at the instance of the owner, and he applies for assessment within the time limited, but fails to press his suit for many years, he may recover interest notwithstanding his delay, for the corporation might have brought the suit to trial.⁴

It has been decided, that a corporation succeeding to another through foreclosure and reorganization, is only responsible for interest on unpaid compensation from the date of its possession.⁵ But it has been held, elsewhere, that the successor corporation should be charged with interest from the original taking, on the

¹ *Parks v. Boston*, 15 Pick. 198; N. Y. 123. See *Norris v. Baltimore*, 44 Old Colony R. v. Miller, 125 Mass. 1; Md. 598.

Delaware, L. & W. R. v. Burson, 61 Pa. 369; Pennsylvania S. V. R. v. ² *Piggott v. Gt. West. R.*, 18 Ch. D. 146.

Ziener, 124 Pa. 560; *Cincinnati v. Whetstone*, 47 Ohio St. 196; *Bangor & P. R. v. McComb*, 60 Me. 290. See ³ *Diedrich v. Northwest Union R.*, 47 Wis. 662.

also *Noble v. Des Moines & S. F. R.*, 61 Iowa, 637; *Devlin v. New York*, 131 ⁴ *Drury v. Midland R.*, 127 Mass. 571.

⁵ *Adams v. St. Johnsbury & L. C. R.*, 57 Vt. 240.

broad ground that this is a part of the compensation, without which property cannot be acquired for the public use.¹

§ 280. Where the landowner is left in possession for a time after the date of valuation, the possession has been deemed equivalent to interest.² In other decisions possession is not deemed equivalent to interest, as it is permissive only, and does not carry the right to improve the property save at the possessor's risk.³ The best rule is that which does not arbitrarily make possession equivalent to interest, but allows interest from the date of valuation, and reduces the amount by the estimated value of the possession.⁴ Where the owner appeals unsuccessfully from the award he cannot claim interest for the additional delay, for it is caused by his mistaken appeal.⁵ But an unsuccessful appeal by the owner will not estop him from claiming additional interest if the corporation has appealed also.⁶ Where the owner's appeal results in an increased award, he has been allowed interest on the new award from the same date as that from which interest began upon the award appealed from.⁷ Where compensation, paid into court pending appeal, was withdrawn by the owner on bond, and the award was finally reduced, the corporation was allowed interest on the difference.⁸

§ 281. As a rule the award bears interest until paid, unless indeed the delay is trifling,⁹ or is due to the action of the owner.¹⁰

¹ *New York & G. L. R. v. Stanley's Heirs*, 35 N. J. Eq. 283. See also *Drury v. Midland R.*, 127 Mass. 571.

² *South Park Comm. v. Dunlevy*, 91 Ill. 49; *New York & B. Bridge v. Clark*, 137 N. Y. 95. See also *Hamersly v. New York*, 56 N. Y. 533; *Donnelly v. Brooklyn*, 121 N. Y. 9; *Stewart v. County*, 2 Pa. 340; *Hilton v. St. Louis*, 99 Mo. 199; *Shoemaker v. United States*, 147 U. S. 282.

³ *Philadelphia v. Dyer*, 41 Pa. 463. See also *Old Colony R. v. Miller*, 125 Mass. 1. Compare *Norris v. Philadelphia*, 70 Pa. 332.

⁴ *Metler v. Easton & A. R.*, 37 N. J. L. 222; *Fink v. Newark*, 40 N. J. L. 11; *Warren v. First Division S. P. & P. R.*, 21 Minn. 424; *West v. Milwaukee, L.*

& W. R., 56 Wis. 318; *Plum v. Kansas City*, 101 Mo. 525. See also *Uniacke v. Chicago, M. & S. P. R.*, 67 Wis. 108.

⁵ *Metler v. Easton & A. R.*, 37 N. J. L. 222; *Reisner v. Union Depot, etc. Co.*, 27 Kan. 382.

⁶ *Metler v. Easton & A. R.*, 37 N. J. L. 222.

⁷ *Hartshorn v. Burlington, C. R. & N. R.*, 52 Iowa, 613; *Selma R. & D. R. v. Gammage*, 63 Ga. 604; *Sioux City R. v. Brown*, 13 Neb. 317.

⁸ *Watson v. Milwaukee & M. R.*, 57 Wis. 332.

⁹ *Scott v. St. Paul & C. R.*, 21 Minn. 322.

¹⁰ See *Philadelphia, W. & B. R. v. Gesner*, 20 Pa. 240.

But it has been held that the legislature need not compel expropriators, especially political corporations, to tender the amount due, but may require payment only on demand. In such case, interest begins to run from the demand,¹ and, if on demand the principal only is tendered and accepted, interest cannot be afterwards recovered, though the acceptance was under protest.² It has been decided also, that where the expropriators have a reasonable time after the ascertainment of compensation within which to freely discontinue or proceed,³ interest cannot be claimed if an election to appropriate be made within the time.⁴

COSTS.

§ 282. It seems to be an imperative deduction from the principle that compensation must be paid for property taken for public use, that in no case shall the owner be compelled to pay the legal costs voluntarily incurred by the expropriators in proceedings to condemn. It has been decided that even where expropriators appeal from the award and obtain its reduction, they must pay their costs, as the appeal is but a continuation of the original proceeding instituted by them to determine their rights and liabilities.⁵ But there seems to be no objection, on principle, to compelling the owner to pay all the costs of an appeal which he has prosecuted without success,⁶ and this course has been approved, not only where the owner is the sole appellant,⁷ but where the expropriators appeal also.⁸

Where proof of the public utility of a proposed work must precede condemnation,⁹ it has been held that an owner who contests the question of utility unsuccessfully must pay all the costs of litigation.¹⁰

¹ *Barnes v. New York*, 27 Hun, 236. See also *Beveridge v. Park Comm.*, 100 Ill. 75.

² *Cutter v. New York*, 92 N. Y. 166.

³ See § 198.

⁴ *Norris v. Baltimore*, 44 Md. 598.

⁵ *New York, W. S. & B. R.*, 94 N. Y. 287. But see *Leake v. Selma R. & D. R.*, 47 Ga. 345; *Noble v. Des Moines & S. L. R.*, 61 Iowa, 637.

⁶ See *New York, W. S. & B. R.*, 94 N. Y. 287.

⁷ *Ranlet v. Concord R.*, 62 N. H. 561;

Hamlin v. New Bedford, 143 Mass. 192.

⁸ *Washburn v. Milwaukee & L. W. R.*, 59 Wis. 364; *Metler v. Easton & A. R.*, 37 N. J. L. 222.

⁹ See § 326.

¹⁰ *Senaker v. The Justices*, 4 Sneed, 116; *Folmar v. Folmar*, 71 Ala. 136.

§ 283. The French Code prescribes that where the compensation assessed by the jury does not exceed the offer made for the property, those who have refused the offer shall pay the costs of the proceedings to condemn.¹ Less favorable to the expropriators is the provision in the Lands Clauses Act,² that where the compensation assessed is not greater than that offered, each party shall pay "one-half of the costs of summoning, impaneling, and returning the jury, and of taking the inquiry and recording the judgment thereon, in case such verdict should be taken." This clause has been so strictly construed that where the owner refused a sum which covered certain costs, and obtained a smaller sum on an assessment, he was yet allowed costs, because something more than compensation had been offered.³ The foreign legislation cited is certainly equitable, for the event proves that formal proceedings were not in fact necessary for the protection of the owner's interest. But it has been held in this country that, although the offer exceed the compensation assessed, the owner cannot be charged with the costs of the expropriators.⁴

§ 284. To whom should the owner's costs be charged? It has been held, that compensation includes the costs necessarily incurred by the owner in fairly presenting his side of the issues raised by the effort to condemn his property.⁵ But, as a rule, the owner's costs are viewed from the common-law standpoint, and are not chargeable to the expropriators,⁶ unless otherwise ordered by the condemnation act,⁷ by a general act allowing costs in special proceedings,⁸ or by a general act in respect to costs, the provisions of which are sufficiently broad

¹ Art. 40.

² Sect. 51.

³ *Balls v. Met. Bd. of Works, L. R. 1 Q. B. 337.*

⁴ *Southwestern Land Co. v. Ditch Co.*, 18 Col. 489; *Cherokee v. Town Lot, etc. Co.*, 52 Iowa, 279. See also *Ulster & D. R. v. Gross*, 31 Hun, 83.

⁵ *Dolores, etc. Canal v. Hartman*, 17 Col. 138. See also *San Diego Land, etc. Co. v. Neale*, 88 Cal. 50; *Johnson v.*

Sutliff, 17 Neb. 423; *San Francisco v. Collins*, 98 Cal. 259.

⁶ *Metler v. Easton & A. R.*, 37 N. J. L. 222; *Gifford v. Dartmouth*, 129 Mass. 135. See also *Philadelphia, G. & N. R. v. Johnson*, 2 Whart. 275.

⁷ *Childs v. New Haven & N. Co.*, 135 Mass. 570; *Pennsylvania R. v. Keiffer*, 22 Pa. 356; *Owners, etc. v. Albany*, 15 Wend. 374.

⁸ *Rennselaer & S. R. v. Davis*, 55 N. Y. 145.

to cover condemnation proceedings. It has been held, that where it is provided that the losing party shall pay costs, the corporation shall pay, if the owner establishes his claim to compensation, even though the amount be reduced on the appeal of the corporation.¹ Whatever be the rule as to the costs of the expropriators on an unsuccessful appeal by the owner, the latter is not entitled to recover his own.² Assuming that the owner is entitled to recover his costs, these should not include counsel fees,³ unless the statute otherwise provides.⁴

TIME OF VALUATION.

§ 285. The value of the property may be viewed from two standpoints, its value in anticipation of the undertaking, and its value without this adventitious circumstance. We have already seen that in no case can expropriators allege a depreciation in value due to the anticipation of the undertaking.⁵ Therefore, the property should be valued as of a date anterior to its depreciation from this cause. We have seen, also, that in some cases the owner has been allowed to show an enhancement in value due to the projection of the undertaking in question.⁶ It has been decided that the legislature may cut off this unearned increment by fixing a date for valuation anterior to its realization. Thus, it may be enacted that, in condemning land for a park, it shall be appraised at its value before the projection of the park has enhanced it.⁷

Putting aside the consideration of enhancement due to the undertaking, as controlling the time of valuation, we find this rule of wide application in cases where compensation subsequent is assessed. Property is to be valued as of the time when the right to compensation vests, — when the property is taken.⁸ In

¹ *Bangor & P. R. v. Chamberlain*, 60 Me. 285.

² *Morse, Petitioner*, 18 Pick. 443.

³ *San José & A. R. v. Mayne*, 83 Cal. 566; *Minneapolis & N. R. v. Woodworth*, 32 Minn. 452. See also *Marshall Fishing Co. v. Hadley Falls Co.*, 6 Cush. 602.

⁴ *Whitney v. Lynn*, 122 Mass. 338; *Taylor v. Chicago, M. & S. P. R.*, 83 Wis. 645.

⁵ See § 248.

⁶ See § 248.

⁷ *May v. Boston*, 158 Mass. 21. See also *Shoemaker v. United States*, 147 U. S. 282.

⁸ *Cobb v. Boston*, 109 Mass. 438; *Hampden Paint Co. v. Springfield, A. & N. R.*, 124 Mass. 118; *Bancroft v. Cambridge*, 126 Mass. 438; *Texas & S. L. R. v. Matthews*, 60 Tex. 215; *Chicago, K. & N. R. v. Broquet*, 47

cases where proceedings may be discontinued after the assessment of compensation, it is clear that the date of valuation cannot be that of the taking. It has been deemed proper in such cases to take the first definite expression of an intention to condemn as the valuation point.¹ Thus, where a petition was filed in 1873, trial begun in 1876, and concluded in 1877, the basis of assessment was the value of the property in the year of the petition.² Where compensation must be tendered before the property is occupied, it has been held that the property should be valued at the time when the assessment is made.³

§ 286. On an appeal from the award, the property is to be valued as of the time with reference to which it was appraised by the inferior tribunal.⁴

Where a corporation wrongfully occupies land, and afterwards proceeds to condemn,⁵ the land is to be valued as of the date of the lawful taking, not of the trespass.⁶ So, the time of formal condemnation has been held to be the proper time for valuation, where the corporation has previously entered upon the land by consent,⁷ or without protest.⁸ But it has been held, that where an entry on mortgaged property under agreement with the owner, but without the consent of the mortgagee, gives rise to equitable claims in respect to the compensation, a court of equity will fix the date of valuation at the entry.⁹ In New Jersey, therefore, the date of valuation, in case compensation is assessed after an

Kan. 571; *Stafford v. Providence*, 10 R. I. 567; *Lafayette, M. & B. R. v. Murdock*, 68 Ind. 137; *Texas & S. L. R. v. Cella*, 42 Ark. 528; *Missouri Pacific R. v. Hays*, 15 Neb. 224; *Dep't of Public Parks*, 53 Hun, 280; *Penny v. Penny*, L. R. 5 Eq. 227.

¹ *Lieberman v. Chicago & S. S. R.*, 141 Ill. 140; *Burt v. Ins. Co.*, 115 Mass. 1. *San José & A. R. v. Mayne*, 83 Cal. 566.

² *South Park Comm. v. Dunlevy*, 91 Ill. 49.

³ *West v. Milwaukee, L. & W. R.*, 56 Wis. 318; *Lamborn v. Bell*, 18 Col. 346; *Railroad Co. v. Perkins*, 49 Ohio St. 326. See also *Georgia South. R. v. Small*, 87 Ga. 355.

⁴ *Metler v. Easton & A. R.*, 37 N. J. L. 222; *Minneapolis v. Wilkin*, 30 Minn. 145; *Missouri Pacific R. v. Wernwag*, 35 Mo. App. 449.

⁵ See § 118.

⁶ *Lyon v. Green Bay & M. R.*, 42 Wis. 538; *Texas Western R. v. Cave*, 80 Tex. 137. See also *Graham v. Pittsburgh & L. E. R.*, 145 Pa. 504; *Railroad Co. v. Perkins*, 49 Ohio St. 326. See *Pomeroy v. Chicago & M. R.*, 25 Wis. 641; *Daniels v. Railroad Co.*, 41 Iowa, 52.

⁷ *Leeds v. Camden & A. R.*, 53 N. J. L. 229.

⁸ *Chicago, M. & S. R. v. Randolph, etc. Co.*, 103 Mo. 451.

⁹ *North Hudson County R. v. Boorsem*, 28 N. J. Eq. 450.

entry by consent, depends on whether it is assessed according to the statute, or in a suit in equity.¹ Where property is not actually appropriated, but is so damaged as to entitle the owner to compensation on account of depreciation in value, the time of appraisal is when the injury was done.²

PAYMENT.

§ 287. We have defined the position of compensation in the law of eminent domain, and have indicated the general principles which govern its assessment. Where the amount of compensation has been determined, the next question is as to the time, manner, and effect of payment. The subject of payment should be one of the simplest titles, yet it is, unfortunately, one of the most complicated in some respects. In England, the promoters must pay or deposit the assessed compensation before entering upon land.³ Substantially the same rule prevails in France.⁴ It will be seen, presently, that this plain and effective rule of action is not incorporated in the organic law of all the American commonwealths.

A proper tender of compensation will usually secure all the rights conferred by actual payment.⁵ A tender of compensation is not made unless the owner is enabled to assume dominion over the money.⁶ Hence, it is not a tender to pay the money into court to abide the result of an appeal,⁷ though it has been held that if the custodian of the deposit be directed to withhold it, the direction is to be treated as a nullity.⁸ So, there is no tender where money is deposited with the clerk of the court, with instructions to pay it to the owner upon his executing a

¹ *Trimmer v. Pennsylvania, P. & B. R.*, 55 N. J. L. 46. 685; *Scott v. St. Paul & C. R.*, 21 Minn. 322; *Evans v. Haefner*, 29 Mo.

² *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. 411; *Chicago, B. & Q. R. v. Andrews*, 26 Kan. 702. 141.

³ *Lands Clauses Act*, sect. 84. ⁶ *White v. Wabash, S. L. & P. R.*, 64 Iowa, 281.

⁴ *Code*, Art. 53. ⁷ *Redman v. Philadelphia, M. & M. R.*, 33 N. J. Eq. 165; *Watson v. Pittsburgh & C. R.*, 2 Pitts. 99.

⁵ *Baltimore & O. R. v. Nesbit*, 10 How. 395; *Stacey v. Vermont Cent. R.*, 27 Vt. 39; *Montgomery & W. P. R. v. Walton*, 14 Ala. 207; *Oliver v. Union Point & W. P. R.*, 83 Ga. 257; *Hueston v. Hamilton & E. R.*, 4 Ohio St. 627. ⁸ *Meyer v. State*, 125 Ind. 335; *Consumers Gas Trust Co. v. Harless*, 181 Ind. 446. See also *Meily v. Zurmehly*, 23 Ohio St. 627.

deed for the land.¹ Where a determination of the necessity of a work is a condition precedent to its accomplishment, a tender of compensation made prior to such determination has been declared ineffective.²

Time of Payment.

§ 288. From the constitutions we get these several commands, — to prepay compensation;³ to prepay or deposit money in lieu thereof;⁴ to prepay or give security, the form of which is not prescribed, in lieu thereof;⁵ to pay compensation.⁶ The statutes which give effect to these commands, and the decisions which construe them, make a considerable body of law on the subject of payment. We waive, for the present, the question of payment on account of injury to land not occupied, and confine the discussion to cases of occupation.

§ 289. *Payment before Title vests.* — The cases are full of the distinction between compensation precedent and compensation subsequent. Precedent and subsequent to what, — entry upon land, or vesting of title? Where compensation precedent is prescribed, it follows, of course, that title to the property does not pass before payment.⁷ It has been decided further, that, on principle, title cannot vest before payment.⁸ It is sometimes provided that title to the property condemned shall vest before the owner has received the compensation due. What effect should be given to such a provision? In Pennsylvania, it appears that a corporation may acquire an indefeasible title to

¹ *Kanne v. Minneapolis & S. L. R.*, 30 Minn. 423.

² *Toledo, A. A. & G. T. R. v. Dunlap*, 47 Mich. 456.

³ Colorado, ii. 15; Georgia, i. 3; Maryland, iii. 46; Mississippi, i. 17; Alabama, xlii. 7 (individuals and corporations, private or municipal); Indiana, i. 21 (except in the case of the State); New Jersey, iv. 7 (private corporations).

⁴ California, i. 14; Kansas, xii. 4; Missouri, ii. 20; Montana, iii. 14; North Dakota, i. 14; Ohio, i. 19; Arkansas, xii. 9 (corporations); South Carolina, xii. 3 (where a right of way is

taken); Texas, i. 17 (State expressly excepted); Washington, i. 16.

⁵ Iowa, i. 18; Kentucky, § 242; Michigan, xv. 9; Minnesota, i. 3; Nevada, viii. 7; Oregon, xi. 4; Pennsylvania, i. 10; West Virginia, iii. 9 (internal improvement corporations).

⁶ This command is expressed or implied in the remaining constitutions.

⁷ *Green v. Missouri Pacific R.*, 82 Mo. 653; *Terre Haute & L. R. v. Crawford*, 100 Ind. 550. See also *Derby v. Gage*, 60 Mich. 1.

⁸ *Stacey v. Vermont Vt. Cent. R.*, 27 39; *Cushman v. Smith*, 34 Me. 247; *Manchester & K. R. v. Keene*, 62 N. H. 81.

an easement condemned, although the ability of the owner to obtain compensation in fact is doubtful. It has been held that title to the easement passes upon giving the statutory bond approved by the court,¹ that it is immaterial that the security prove worthless in fact,² and that the easement is not subjected to a lien for compensation.³

It has been held that where the state is the actor, the legislature may prescribe that title shall pass upon the ascertainment of compensation, upon the presumption that the state can and will pay.⁴ In *Garrison v. New York*,⁵ it was said, that "any declaration in the statute that the title will vest at a particular time must be construed in subordination to the constitution, which requires, except in cases of emergency admitting of no delay, the payment of compensation, or provision for its payment, to precede the taking, or at least to be concurrent with it." Where the statute provides that the title to land condemned shall vest in the corporation before payment, the land is subject, nevertheless, to a lien for the compensation.⁶

§ 290. **Payment before Entry.** — Where prepayment is required, and this condition is often imposed by the legislature although not required by the constitution, payment before entry is generally meant.⁷

The condition of payment has been considered hitherto with reference to an occupation of property for public use. Where compensation is to be paid for property damaged, or injuriously affected,⁸ a different question is presented. Certain constitutions and statutes are so construed that the command to prepay compensation does not refer to a damaging of property, but solely to a taking.⁹ But it is sometimes declared that compensation

¹ *Fries v. South Pennsylvania, etc. R.*, 85 Pa. 73. *delphia, M. & M. R.*, 33 N. J. Eq. 165; *Covington Short Route, etc. R.*

² *Wallace v. New Castle North. R.* 138 Pa. 168. *v. Piel*, 87 Ky. 267; *Dusenbury v. Mut. Un. Tel. Co.*, 64 How. Pr. 206.

³ *Hoffman's Appeal*, 118 Pa. 512.

⁴ See §§ 153-157

⁵ *Ballou v. Ballou*, 78 N. Y. 325.

⁶ *Denver & S. F. R. v. Domke*, 11

⁷ 21 Wall. 196.

Col. 247, *Ward v. Ohio River R.*, 35

⁸ *New York, W. S. & B. R.*, 94 N. Y. 287.

W. Va. 481; *O'Brien v. Baltimore Belt*

⁹ *Schreiber v. Chicago & E. R.*, 115

R., 74 Md. 363; *Campbell v. Met. St.*

Ill. 340; *Chicago, S. L. & W. R. v.*

R., 82 Ga. 320. See also *Parker v.*

Gates, 120 Ill. 86; *Redman v. Phila-*

Catholic Bishop, 146 Ill. 158; *Lorie v.*

Chicago City R., 32 Fed. Rep. 270.

shall be first paid or secured, as well for property damaged as for property taken.¹ It has been recently held in Louisiana, however, that such a declaration must be literally followed only where the consequential injury is a physical invasion of property, the effect of which can be fairly foreseen, — that one cannot demand security on account of the apprehension of a depreciation of his property.² Where compensation precedent is required in case of injury from the construction of works it cannot be claimed in a case where the injury is referable to operation.³

§ 291. **Payment after Entry.** — As a rule, it is only where there is no absolute condition of prepayment that possession can be taken before payment, or tender, and then only when there is security at once sufficient and accessible.⁴

It has been held, that where the state itself is the actor in condemnation proceedings the statute need not provide for security, as the financial responsibility of the government will be presumed, but that provision for a certain and speedy method of recovery is sufficient.⁵ Observation of this rule will probably give the owner ample protection, but, as the ability to collect money from the state does not depend on the state of the treasury, but on the appropriation of funds by the legislature, it seems that there should be an adequate and accessible fund to which the owner may resort as of right.⁶ In the well-considered case of the Connecticut River Railroad Company *v.* County Commissioners,⁷ it was decided that an act, providing that compensation be paid out of the earnings of a state railroad, was void, because there was neither an appropriation of public funds, nor a

¹ Delaware County's Appeal, 119 Pa. 159; *O'Brien v. Pennsylvania S. V. R.*, 119 Pa. 184; *Lafayette v. Wortman*, 107 Ind. 404; *Parkdale v. West*, 12 App. Cas. 602 (Canada). See also *Ash v. Cummings*, 50 N. H. 591; *Streyer v. Georgia South. & F. R.*, 90 Ga. 56.

² *McMahon v. St. Louis, A. & T. R.*, 41 La. An. 827.

³ *Jones v. Stanstead, S. & C. R.*, L. R. 4 P. C. 98 (Canada).

⁴ *Foster v. Stafford Bank*, 57 Vt. 128; *Commonwealth v. Pittsburgh & C. R.*, 58 Pa. 26; *Brock v. Hishen*, 40

Wis. 674; *Cushman v. Smith*, 34 Me. 247.

⁵ *Orr v. Quimby*, 54 N. H. 590. See also *Ash v. Cummings*, 50 N. H. 591; *Montgomery's Case*, 48 Fed. Rep. 896.

⁶ *McClinton v. Pittsburgh, F. W. & C. R.*, 66 Pa. 404. See *Philadelphia & R. R. v. Lawrence*, 10 Phila. 604; *Morris v. Comptroller*, 54 N. J. L. 268; *Orr v. Quimby*, 54 N. H. 590; *Doe, C. J.*, dissenting opinion; *Cushman v. Smith*, 34 Me. 247; *Talbot v. Hudson*, 16 Gray, 417.

⁷ 127 Mass. 50.

pledge of public credit. Where the United States instituted proceedings to condemn, the owners asserted that, inasmuch as the appropriation made by Congress to defray the cost of the undertaking was exhausted, there was no security, and that, therefore, the proceedings could not be maintained. The court held, however, that while the property could not be taken until security had been provided, the proceedings were maintainable for the purpose of ascertaining the value of the property.¹

§ 292. As a municipal corporation is, unlike the state, suable for its debts, it is usually held that where the taxable property within the corporate limits is pledged to secure the payment of compensation, the security is good.² Provided the ultimate responsibility of the city is fixed, there seems to be no objection to the adoption of a special method of raising the necessary funds. Thus, an issue of bonds may afford sufficient security.³ A provision for compensation, the adequacy of which is "contingent on the realization of a fund from taxation for benefits within a limited assessment district," may be insufficient.⁴ There is no objection, however, to a provision for raising the compensation fund by special tax, if, in case of insufficiency, the city may be compelled to resort to a general tax.⁵ So, the security has been deemed sufficient where the act, besides providing for a special assessment, contains a general authority to borrow from other funds.⁶ It has been held that the owner cannot have recourse to the general revenue until the special assessment has failed to produce the necessary funds.⁷ There is not good security if the corporate power of taxation is inadequate to supply sufficient funds,⁸ or if the town itself is not legally incorporated.⁹ A plea that proceedings should be dismissed, because the

¹ *United States v. Oregon R.*, 16 Fed. Rep. 524. 132; *Mitchell v. White Plains*, 62 Hun, 231; *Detroit v. Daly*, 68 Mich. 503; *Lincoln Park*, 44 Minn. 299.

² *Lowerre v. Newark*, 38 N. J. L. 351; *Haverhill Bridge v. County Comm.*, 103 Mass. 120; *Smeaton v. Martin*, 57 Wis. 364; *Church's Case*, 92 N. Y. 1; *Woodruff v. Glendale*, 26 Minn. 78; *Radisill v. State*, 40 Ind. 485.

³ *State v. City of Superior*, 81 Wis. 649.

⁴ *Grand Rapids v. Grand Rapids & I. R.*, 58 Mich. 641.

⁵ *State v. City of Superior*, 81 Wis. 649.

⁶ *Matter of New York*, 99 N. Y. 569.

⁷ *Keene v. Bristol*, 26 Pa. 46.

⁸ *Sage v. Brooklyn*, 89 N. Y. 189.

⁹ *Colton v. Rossi*, 9 Cal. 595.

See also *Chapman v. Gates*, 54 N. Y.

city has reached the limit of its power to contract debts, has been denied for the practical reason that if the city cannot pay it cannot take the property.¹

§ 293. Where the expropriator is a private corporation its financial responsibility is not security. It is generally held that a sufficient and accessible fund must be in existence at the time of the taking. This precaution has been carried so far as to make the giving of security, in effect, a constructive payment, by requiring the deposit in court of compensation which has been tendered and refused.² But a more liberal practice permits entry after depositing in court a sum of money sufficient to cover the probable compensation,³ and a deposit of United States bonds has been considered sufficient.⁴ In Pennsylvania, compensation is secured by the execution of a bond which, in case of objection, must be approved by the court.⁵

§ 294. Where compensation subsequent is lawful, payment must be made within a reasonable time after the property is taken.⁶ Differences of opinion as to what is a reasonable time are frequently due to variant determinations as to the point of time at which the property is taken.⁷ The time of payment may be definitely fixed.⁸ Thus, four months after the taking has been considered a proper time.⁹ Again, the time of payment may be conditioned on the performance of another act. Where a statute provided that payment of compensation for property taken for a street should be made upon the ratification of an assessment for benefits, it was sustained on the assumption that ratification would be made within a reasonable time.¹⁰ A city may be allowed to delay payment for a reasonable time, in order that it may collect, meanwhile, the special taxes imposed in aid of the undertaking.¹¹

¹ Cedar Rapids, 51 N. W. Rep. 1142 (Iowa, 1892). See *Matter of New York*, 99 N. Y. 569.

² *Powers v. Bears*, 12 Wis. 213.

³ *New York Cent. & H. R. R.*, 60 N. Y. 116.

⁴ *Briggs v. Cape Cod Ship Canal*, 137 Mass. 71.

⁵ *Wallace v. Newcastle, etc. R.*, 138 Pa. 168.

⁶ *Philadelphia v. Miskey*, 68 Pa. 49.

⁷ See § 197.

⁸ *Ryan v. Hoffman*, 26 Ohio St. 109.

⁹ *Matter of New York*, 99 N. Y.

¹⁰ *Fink v. Newark*, 40 N. J. L. 11. See also *Leuly v. West Hoboken*, 54 N. J. L. 508.

¹¹ *Hamersly v. New York*, 56 N. Y. 533; *Donnelly v. Brooklyn*, 121 N. Y. 2.

WHO ARE TO PAY COMPENSATION?

§ 295. The ascertainment of the party liable for compensation is seldom a difficult matter. Occasionally, however, the question is sufficiently obscure to call for judicial investigation. The object of the investigation should be to determine the party in whose interest the right of eminent domain is exercised. Where a railroad company and a municipal corporation undertake the improvement of a railroad crossing, the former building a bridge to carry a highway over the tracks, the latter grading the approaches, the city cannot assume a liability for damages from change of grade, for it acts as the agent of the company whose duty it is to provide safe crossings.¹

Where a municipal corporation authorizes a railroad or other company to occupy a street, and the abutter is entitled to compensation,² it is usually held that the company is liable.³ But in *Pekin v. Brereton*,⁴ the city was held liable for injury caused by a railroad embankment in a street, the fee of which was private, on the theory that, as it had authorized the occupation of the street, it was responsible for the additional burden on the fee.⁵ This opinion does not commend itself to our judgment, for it disregards the principle that the party obtaining the benefit of the eminent domain should bear its burdens.⁶ Where the city is responsible, it is prudent for it to permit a railroad company to occupy streets only upon an agreement to reimburse it for such compensation as it may be obliged to pay.⁷

The question sometimes arises, as to which of two political corporations is responsible for compensation in a particular case. Where land within the limits of a city is taken for a street, the

But see *Lafayette v. Shultz*, 44 Ind. 97; *Boston & M. R.*, 3 Cush. 107; *Hedrick McKusick v. Stillwater*, 44 Minn. 372. *Boston & M. R.*, 3 Cush. 107; *Hedrick v. Olathe*, 30 Kan. 348. See *Roll v. Augusta*, 34 Ga. 326; *Corporation of Parkdale v. West*, 12 App. Cas. 602.

¹ *Burritt v. New Haven*, 42 Conn. 174. See also *Gardiner v. Boston & W. R.*, 9 Cush. 1. Compare *Provision Co. v. Chicago*, 111 Ill. 651.

² See § 400. ⁴ 67 Ill. 477.

³ *Burkam v. Ohio & M. R.*, 122 Ind. 344; *Frith v. Dubuque*, 45 Iowa, 406; *Dillenchbach v. Xenia*, 41 Ohio St. 207; *Denver v. Bayer*, 7 Col. 113. See also *Olney v. Wharf*, 115 Ill. 519; *Parker v.*

Stack v. East St. Louis, 85 Ill. 377; *Swenson v. Lexington*, 69 Mo. 157. ⁶ Consult *Green v. Portland*, 32 Me. 431.

⁷ *Chicago, B. & Q. R. v. Chicago*, 134 Ill. 323.

county cannot be called upon for compensation,¹ and the liability of the city has been declared where it called upon the county to relocate streets.² Where a county completed proceedings for the taking of land for a highway, it was ordered to pay the compensation, although the highway had been, in the meantime, set off in another county.³

Where the eminent domain is exercised for the benefit of two or more corporations, each should pay its proportional share of the compensation.⁴ Where a corporation condemns, the stockholders are not personally liable for the compensation.⁵

§ 296. The lien for unpaid compensation⁶ attaches to the property taken through all transfers from corporation to corporation, and may be always enforced against the party in possession.⁷ And the same rule applies to a lien for costs.⁸ Where a corporation is in possession of property as the successor of an insolvent corporation, the latter need not be made a party to a suit for the enforcement of the lien.⁹ The fact that there is an unsatisfied judgment for compensation against the insolvent predecessor of the corporation in possession does not affect the lien.¹⁰ A corporation succeeding to the property and franchises of another is not ordinarily responsible, on principle, for consequential injuries to property done during the incumbency of the latter. Hence, it has been held that where land is flooded by the construction of a railroad, and the railroad passes into the hands of a new company, they are liable only for damage

¹ *Parkersburg Borough Streets*, 124 Pa. 511. See *County of Lancaster v. Frey*, 128 Pa. 593.

² *Brigham v. Worcester County*, 147 Mass. 446.

³ *Jones v. Oxford*, 45 Me. 419.

⁴ *Grand Junction R. v. County Comm.*, 14 Gray, 553. See also *Haverhill Bridge v. County Comm.*, 103 Mass. 120; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Chicago, M. & S. P. R. v. Hall*, 90 Ill. 42.

⁵ *Commonwealth v. Blue Hill Turnpike*, 5 Mass. 420.

⁶ See §§ 228, 385.

⁷ *Drury v. Midland R.*, 127 Mass.

571; *Indiana, B. & W. R. v. Allen*, 113 Ind. 308; *Buffalo, N. Y. & P. R. v. Harvey*, 107 Pa. 319; *Harbach v. Des Moines*, 80 Iowa, 593; *Organ v. Memphis & L. R. R.*, 51 Ark. 235; *Gammage v. Georgia South. R.*, 65 Ga. 614; *Dayton, X. & B. R. v. Lewton*, 20 Ohio St. 401; *Gillison v. Savannah & C. R.*, 7 S. Car. 173.

⁸ *Frankel v. Chicago, B. & P. R.*, 70 Iowa, 424.

⁹ *Bridgman v. St. Johnsbury & L. C. R.*, 58 Vt. 198.

¹⁰ *Bridgman v. St. Johnsbury & L. C. R.*, 58 Vt. 198.

done since their succession.¹ But the conditions of the transfer from one corporation to another may be such as to impose upon the latter the liabilities of the former in respect to consequential injuries.² Where a judgment for permanent damages against a railroad company was recovered by default, the successors of the company were not compelled to abide by the judgment as rendered, but were allowed to have it opened, and to have a reassessment by a jury.³ It has been held improper to sue the corporation in possession upon a judgment for compensation recovered against its predecessor. The judgment represents a debt of the latter for which the former is not responsible, but it is responsible for just compensation, for it takes the property subject to existing liens.⁴

WHO ARE ENTITLED TO COMPENSATION?

§ 297. Where the state authorizes a company to use its property in furtherance of their undertaking, it does not usually exact compensation as for property taken for public use. Indeed, it would seem that, as a rule, the construction of the work should be presumed to be a sufficient consideration for the grant, especially where the property is not already devoted to a specific public use. It has been held, however, that where the state permits a railroad corporation to lay its tracks over the grounds of a state prison, it does not make a gift of the land, but intends that compensation shall be paid.⁵

A distinction between property of the state and property of the municipal corporation has been already drawn.⁶ Where property is of the latter sort, it is the private property of the municipal corporation, which, it seems, may assert its title before the state's

¹ Wead v. St. Johnsbury & L. C. R., Wis. 317. See s. c. 40 Wis. 653. See also Lake Erie & W. R. v. Griffin, 107 64 Vt. 52. See Bizer v. Hydraulic Co., Ind. 464. Compare Buffalo, N. Y. & P. 70 Iowa, 145.

² United States v. Jones, 109 U. S. 513. R. v. Harvey, 107 Pa. 319.

³ Penn Mut. Life Ins. Co. v. Heiss, 141 Ill. 35. Commonwealth v. Boston & M. R., 3 Cush. 25.

⁴ Gilman v. Sheboygan & F. R., 37

⁶ See §§ 63-68.

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eminent domain, and secure compensation in the event of the enforced diversion of the property to non-communal uses. Further, the legislature may command that compensation be paid to a subordinate political corporation.¹ Thus, where a corporation was authorized to lay a turnpike along a line which crossed a county bridge, and was obliged to pay compensation to the owners of land affected, it was decided that the bridge was "land" within the meaning of the act.² A statute authorizing the condemnation of land for the widening of a street has been so construed as to entitle the city to recover compensation, as an ordinary proprietor, for land held by it in trust for the purposes of a park.³ Where property held by a city in trust for the maintenance of schools is taken for a street, the city must be compensated, else would the law be violated which prescribes that the school fund shall not be impaired.⁴ But, in the absence of direction to the contrary, a municipal corporation cannot claim compensation for the authorized use of property within its boundaries.

§ 298. **Private Persons.** — Private persons and corporations interested in the compensation may be divided into two classes. Owners of property, to whom payment must be made in order to perfect title; holders of liens upon or interests in property which do not amount to vested estates. The latter have no relations with the expropriators, unless the statute otherwise provides, but, upon the conversion of the property into money, must enforce their claims against the compensation, or its recipient. The distinction is illustrated in the rule, that while those in the first class are entitled to notice as of right, those of the second are entitled by statute only.⁵

§ 299. Title to the property condemned is based on the fact that compensation has been paid to the true owner. It matters not that the expropriators have acted in good faith, if they pay compensation to the wrong person they are still responsible to the right one.⁶ But the true owner may recover the compensa-

¹ *Rapid Transit Co.*, 111 N. Y. 588.

⁴ *Fagan v. Chicago*, 84 Ill. 227.

² *Freeholders, etc. v. Redbank & H. Turnpike*, 18 N. J. Eq. 91.

³ See §§ 339, 343.

⁵ *Ninth Ave.*, 45 N. Y. 729.

⁶ *Searl v. School District*, 133 U. S.

553; *Hatch v. New York*, 82 N. Y. 436;

tion in an action against the recipient.¹ So, where the rights of one having an interest in the property are not recognized by the expropriators, who pay the whole compensation to the owner, the former may recover his share from the latter.²

Where title to property is in doubt, a private person, desiring to purchase, must buy at his peril, and, where the owner is unknown, he must abandon his intention. The state and its agent occupy a more favorable position with reference to property needed for public use. Public necessity overrides all inconveniences incident to dubiety of ownership. Therefore, where the title to property is in dispute, or the owner is unknown, the property may be taken, and the proper compensation paid into court for the use of the rightful owner.³ But it has been held, that where title is not questioned in the proceedings, the amount awarded should not be paid into court for the benefit of parties entitled, but should be paid to the party named directly, or into court for his benefit.⁴ Wherever compensation has been duly paid into court, the expropriators have fulfilled the constitutional duty of payment. Though the fund be paid over to the wrong person, or improperly apportioned among rightful claimants, they cannot be held responsible.⁵

§ 300. When compensation is assessed in proceedings instituted by the expropriators, persons named in the petition as owners are not called upon to prove their title. For the purposes of the proceeding their title is admitted.⁶ When a property

South Park Comm. v. Todd, 112 Ill. 379. 118 Ill. 655; *Jones v. Florida, C. & P. R.*, 41 Fed. Rep. 70.
See also *Mitchell v. Met. El. R.*, 134 N. Y. 11.

¹ *De Peyster v. Mali*, 92 N. Y. 262; 142 U. S. 671.

² *Meginnis v. Nunamaker*, 64 Pa. 374. ³ *United States v. Dunnington*, 146 U. S. 338. See also *Heirs of Van Vorst*, 2 N. J. Eq. 292; *Columbia Bridge v. Geisse*, 34 N. J. L. 268; *Haswell v. Vermont Cent. R.*, 23 Vt. 228; *Miller v. Asheville*, 112 N. C. 759.

⁴ *Sherwood v. Lafayette*, 109 Ind. 411; *Brinckerhoff v. Wemple*, 1 Wend. 470. See also *Harris v. Howes*, 75 Me. 436; *Bank of Auburn v. Roberts*, 44 N. Y. 192; *Martin v. London, C. & D. R.*, L. R. 1 Eq. 145. ⁵ *Wilcox v. St. Paul & N. R.*, 35 Minn. 439; *Met. City R. v. Chicago W. D. R.*, 87 Ill. 317; *Chicago & I. R. v. Hopkins*, 90 Ill. 316; *G. B. & L. R. v. Haggart*, 9 Col. 346; *Omaha, N. & B. R. v. Gerard*, 17 Neb. 587; *Bentonville R. v. Stroud*, 45 Ark. 278. See also *Cummins*

⁶ See *Dep't Public Parks*, 73 N. Y. 560; *Chicago & W. I. R. v. Prussing*, 96 Ill. 203; *Gedeye v. Comm.* (1891), 2 Ch. 630; *McCormick v. Park Comm.*,

owner institutes proceedings to recover compensation, he must prove his title as in an ordinary action.¹ Compensation may be recovered by one having a possessory title.² Property held on a three hundred year lease was condemned shortly before the expiration of the term. The tenant received compensation for his interest, and, the reversioner being unknown, compensation for his estate was paid into court. Some years later, the deposit being still unclaimed, the late tenant claimed it. His claim was worthless, of course, at common law, and it was held that he had not been in possession within the meaning of the statute,³ providing that one in possession shall be deemed the owner until the contrary is shown.⁴

§ 301. Wherever a single owner is in possession of property which is unaffected by any interests of other parties, he is entitled, of course, to receive the whole compensation awarded. Where one has a base fee, it has been held that he should receive the full value of the land, as the interest of the grantor is too remote to be treated as property.⁵ The fee of the territory of the Cherokee Nation is in the Nation, but the occupants of the land have so complete a right of enjoyment that, when a right of way is condemned, they are entitled to the compensation.⁶

Where the owner is *non sui juris*, or the property is held in trust, payment should be made to the guardian or trustee for his benefit.⁷ But if the compensation has been paid to the administrator of an estate, and applied by him to the benefit of the heirs, a court of equity will not permit the latter to recover possession until they refund the money.⁸ Where a minor sells land

v. Des Moines & S. R., 63 Iowa, 397; *Wright v. Butler*, 64 Mo. 165. See *Allyn v. Providence, W. & B. R.*, 4 R. I. 457. See also § 251.

¹ *Philadelphia & R. R. v. Obert*, 109 Pa. 193; *Tufts v. Charlestown*, 117 Mass. 401; *Costello v. Burke*, 63 Iowa, 361; *Lawrence R. v. Cobb*, 35 Ohio St. 94; *Chicago, K. & N. R. v. Cook*, 43 Kan. 83; *Diedrich v. Northwest. Union R.*, 42 Wis. 248.

² *Andrew v. Nantasket Beach R.*, 152 Mass. 506. See also *Hawkins v. Comm.*, 2 Allen, 254; *Sacramento Val. R. v. Moffatt*, 7 Cal. 577.

³ *Lands Clauses Act*, § 79.

⁴ *Gedeye v. Comm.* (1891), 2 Ch. 630.

⁵ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁶ *Payne v. Kansas & A. R.*, 46 Fed. Rep. 546.

⁷ *Small v. Georgia South. & F. R.*, 87 Ga. 602; *State v. Easton & A. R.*, 36 N. J. L. 181; *Brown v. Rome & D. R.*, 86 Ala. 206. See also *Davis v. Charles River, etc. R.*, 11 Cush. 506.

⁸ *Galveston, H. & S. A. R. v. Blakeny*, 73 Tex. 180.

to one in whose hands it is condemned, she may exercise her right of revocation, and intervene in the proceedings in order to secure compensation.¹ Where compensation is received by the trustee of an estate it should be treated as proceeds of the sale of property, and credited to capital, not to income.² Where proceedings to condemn are brought against property in the custody of an administrator he should receive the compensation,³ especially in case the estate is insolvent.⁴

§ 302. **Apportionment of Compensation.** — In adjudicating conflicting claims to compensation,⁵ it is determined which of the contesting parties is entitled. In apportioning compensation, the rights of the claimants are admitted, and the only question is as to the proportion which each shall receive. Whatever be the method of appraising the several interests, it is evident that the sum of their values must be the full value of the property taken and no more.⁶ Where land is subject to a life estate the life tenant and remainderman must each receive his proportion of the compensation.⁷ The court may take the net annual value of the premises multiplied by the years of the tenant's expectancy of life, and reduce the amount to present cash value.⁸ Where part of a tract is taken, the compensation to the remainderman is the decrease in the value of the reversion.⁹ Where the injuries to the life estate and the reversion are readily separable, they should be compensated for independently.¹⁰

Where an admeasurement of dower has been made, the dowress is entitled to compensation as the owner of a vested interest,¹¹ but it has been held otherwise where dower has not been

¹ *Hutchinson v. McLaughlin*, 15 Col. 492.

² *Heard v. Eldredge*, 109 Mass. 258.

³ *St. Albans v. Seymour*, 41 Vt. 579. See also *Pennsylvania S. V. R. v. Cleary*, 125 Pa. 442.

⁴ *Goodwin v. Milton*, 25 N. H. 458.

⁵ See § 305.

⁶ See *N. Y. & B. Bridge v. Clark*, 137 N. Y. 95; *United States v. Dunnington*, 146 U. S. 338; *Ross v. Adams*, 28 N. J. L. 160; *Burt v. Ins. Co.*, 115 Mass. 1; *Edmands v. Boston*, 108 Mass. 535; *Chicago v. Garrity*, 7 Ill. App. 474.

⁷ *Kansas City, S. & M. R. v. Weaver*, 86 Mo. 473; *Miller v. Asheville*, 112 N. C. 759.

⁸ *Pittsburgh, V. & C. R. v. Bentley*, 88 Pa. 178.

⁹ *Bentonville R. v. Baker*, 45 Ark. 252.

¹⁰ *Passmore v. Philadelphia, W. & B. R.*, 9 Phila. 579.

¹¹ *York v. Welsh*, 117 Pa. 174. See also *French v. Lord*, 69 Me. 537. See *Bonner v. Patterson*, 44 Ill. 253.

assigned.¹ It has been held that inchoate dower does not confer a right to compensation from the expropriators,² though the wife may claim her share in the award.³

Although a judgment creditor need not be made a party to proceedings to condemn as an owner,⁴ he may have the compensation paid into court in order that his share may be set off to him.⁵

§ 303. The position of a mortgagee of the property condemned depends on the estimation of the interest created by a mortgage. In some States, a mortgagee out of possession has not an interest which need be recognized, unless plainly commanded by statute.⁶ But, in other States, the mortgagee has a vested estate, and must be recognized by the expropriator.⁷ The mortgagees of railroad property and franchises need not be made parties where a right of way across the track is condemned. They have no interest in the compensation as long as the corporation retains control of the road.⁸ If a mortgagee is not made a party he may have the compensation paid into court, and receive his due proportion.⁹ In case the mortgage debt exceeds the value of the property the mortgagor of course receives nothing.¹⁰

§ 304. The interest of a lessee has been treated as a specific property separable from the estate of the lessor.¹¹ In other deci-

¹ *Todemier v. Aspinwall*, 43 Ill. 401. 13 W. Va. 476; *Astor v. Hoyt*, 5 Wend.

² *Moore v. New York*, 8 N. Y. 110; 603; *Knoll v. New York, S. L. & C. R.*, 121 Pa. 467; *Farnsworth v. Boston*, 126 Mass. 1.

French v. Lord, 69 Me. 537. See also *Duncan v. Terre Haute*, 85 Ind. 104; *Weaver v. Gregg*, 6 Ohio St. 547; *Gwynne v. Cincinnati*, 3 Ohio, 24. See *Nye v. Taunton Branch R.*, 113 Mass. 277; *Simar v. Canaday*, 53 N. Y. 298.

³ *Wheeler v. Kirtland*, 27 N. J. Eq. 534.

⁴ See § 340.

⁵ *Alhauser v. Doud*, 74 Wis. 400. See also *Philadelphia v. Dyer*, 41 Pa. 463. See *Harris v. Brewster*, 154 Pa. 22; *Chicago, B. & Q. R. v. Chamberlain*, 84 Ill. 333.

⁶ *Parish v. Gilmanton*, 11 N. H. 293; *Whiting v. New Haven*, 45 Conn. 303; *Crane v. Elizabeth*, 36 N. J. Eq. 339. See also *Schumacker v. Toberman*, 56 Cal. 508; *Keystone Bridge v. Summers*, 13 W. Va. 476; *Astor v. Hoyt*, 5 Wend. 603; *Knoll v. New York, S. L. & C. R.*, 121 Pa. 467; *Farnsworth v. Boston*, 126 Mass. 1.

⁷ *Severin v. Cole*, 38 Iowa, 463; *Michigan Air Line R. v. Barnes*, 40 Mich. 383; *Sherwood v. Lafayette*, 109 Ind. 411; *Wilson v. European & N. A. R.*, 67 Me. 358; *Warwick Inst. for Savings v. Providence*, 12 R. I. 144; *Dodge v. Omaha & S. R.*, 20 Neb. 276. See also *Hagar v. Brainerd*, 44 Vt. 294.

⁸ *Grand Rapids v. Grand Rapids & I. R.*, 58 Mich. 641. See *Parker's Petition*, 36 N. H. 84.

⁹ *Bright v. Platt*, 32 N. J. Eq. 362; *Sawyer v. Landers*, 56 Iowa, 422; *Utter v. Richmond*, 112 N. Y. 610.

¹⁰ See *Matter of Brooklyn*, 73 Hun, 499.

¹¹ *Morgan R. & S. S. Co.*, 32 La. An. 371; *Atchison, T. & S. F. R. v. Schnei-*

sions the land is treated as the only property condemned, and the gross compensation is apportioned between the lessor and lessee, according to the worth of their interests.¹ Whichever course is followed, the question to be determined is the relation which the interests of the lessor and lessee bear to the full value of the property. If the rent equals or exceeds the real yearly value of the premises, it has been held that the interest of the lessor only is to be considered, as the tenant suffers no loss.² If the rent is less than the yearly value, compensation should be allowed in respect to the difference.³ Where leasehold premises were condemned, the lessee was paid the amount of rent for the remainder of the term for which he was still liable to the lessor.⁴ A covenant for renewal increases the value of the term, and diminishes the value of the reversion.⁵ It has been held that the possibility of a renewal should not be considered.⁶ In a recent case, however, the circumstances were such as to make the probability of renewal a factor of value. The owner of the land had leased it to a brick-maker for so many years that it had acquired a peculiar value as a brickyard. It had been leased on short terms, and the probability of future renewals was sufficiently strong to enhance the salability of the current lease. The court held that the lease was worth what it would bring, and that the probability of renewal should be taken into account.⁷ The value of the reversion is increased by the covenant of the tenant to pay taxes and assessments.⁸ Where the property taken was a public house, owned by a brewer and leased with a covenant that no beer other than his own should be sold, it was held that, as the covenant increased the value of the premises to the owner,

der, 127 Ill. 144. See also *Kersey v. Schuylkill River, etc. R.*, 133 Pa. 234; *Seattle & M. R. v. Scheike*, 3 Wash. 625.

¹ *Edmands v. Boston*, 108 Mass. 535. See also *Kohl v. United States*, 91 U. S. 367.

² *Morgan R. & S. S. Co.*, 32 La. An. 371; *Becker v. Chicago, B. & Q. R.*, 126 Ill. 436; *Corrigan v. Chicago*, 144 Ill. 537.

³ *Morgan R. & S. S. Co.*, 32 La. An. 371; *New York, W. S. & B. R. v. Bell*, 28 Hun, 426. See also *Wiggin v. New York*, 9 Paige, 16.

⁴ *Booker v. Venice & C. R.*, 101 Ill. 333.

⁵ *William & Anthony Streets*, 19 Wend. 678; *North Pennsylvania R. v. Davis*, 26 Pa. 238. See also *Cobb v. Boston*, 109 Mass. 438.

⁶ *Ranlet v. Concord R.*, 62 N. H. 561. See also *Shaber v. Reading*, 150 Pa. 402.

⁷ *Baltimore v. Rice*, 73 Md. 307.

⁸ *William & Anthony Streets*, 19 Wend. 678.

he should be indemnified for its abrogation.¹ In fixing the value of a leasehold interest evidence of a suit in ejectment against the lessor, and his disclaimer as to part of the premises, is material as tending to depress the market value of the lease.² Where a partial appropriation of leased premises does not abrogate the lease,³ the lessee retains, of course, his interest in the remainder. In such case, the assessment is governed by the general rules as to valuation heretofore considered. Where buildings on leased premises condemned have been built by the lessee, upon an agreement that the lessor shall pay their value on the expiration of the lease, the lessee is entitled to compensation for them.⁴

§ 305. **Conflicting Claims to Compensation.** — The courts are frequently called upon to designate the proper recipient of compensation. The question may be presented by the expropriators, who wish the direction of the court, or it may arise in a contest between rival claimants. Although space will not permit the statement of many of the cases in point,⁵ the leading groups of decisions will be considered.

When one having an interest in the land appropriated to public use dies pending the proceedings, the right to compensation vests in the heirs, not the personal representatives.⁶ But the right to damages for a trespass is a personal asset, and vests in the personal representatives.⁷ It has been held that the right to permanent compensation on account of property "damaged" by public works,⁸ passes to the personal representatives.⁹ Where

¹ *Bourne v. Liverpool*, 33 L. J. 134; *Dubuque & D. R. v. Diehl*, 64 (Q. B.) 15. Iowa, 635; *Turner v. Robbins*, 133 Mass.

² *Pennsylvania R. v. Eby*, 107 Pa. 207; *Chicago, B. & Q. R. v. Chamberlain*, 84 Ill. 333.

³ See § 170.

⁴ *Contant v. Catlin*, 2 Sandf. Ch. 485; *Livingston v. Sulzer*, 19 Hun, 375; *Matter of Buffalo*, 17 N. Y. S. R. 371. See *Schreiber v. Chicago & E. R.*, 115 Ill. 340. ⁵ *Mitchell v. Met. El. R.*, 134 N. Y. 11. See also *Valley R. v. Bohm*, 29 Ohio St. 633; *Peoria & R. R. v. Rice*, 75 Ill. 329; *Oliver v. Pittsburgh, V. & C. R.*, 131 Pa. 408; *Parker v. Chestnutt*, 80 Ga. 12.

⁶ See *Chicago v. Tebbetts*, 104 U. S. 120; *Eleventh Avenue*, 81 N. Y. 436; *Hatch v. New York*, 82 N. Y. 436; *Matter of New York*, 90 N. Y. 390; *Welch v. Importers, etc. Bank*, 122 N. Y. 177; *Matter of Rochester*, 136 N. Y. 83; *Ingalls v. Byers*, 94 Ind. 134; *Griswold v. Met. El. R.*, 122 N. Y. 102; *Pittsburgh, F. W. & C. R. v. Swinney*, 97 Ind. 586.

⁷ *Shepherd v. Manhattan R.*, 117 N. Y. 442. ⁸ See § 153. ⁹ *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35. See *Pennsylvania S. V. R. v. Ziomer*, 124 Pa. 560.

the right to compensation accrues during the owner's lifetime it passes on his death to his personal representatives.¹

§ 306. Where an interest in property is condemned, and, before the payment of compensation, the owner sells the property, the right to compensation does not pass to the vendee unless expressly transferred. The right is the personal right of the vendor.² So, where a public undertaking has been constructed upon premises by the consent of the owner his vendee cannot have compensation.³

A waiver of compensation is binding on a vendee of the premises.⁴ Thus, one who buys land upon a street, mapped out and further dedicated to a railroad use, cannot recover compensation upon the construction of the railroad.⁵ Where an abutter on a private way petitions for the adoption of the way as a public street, and releases all claim for compensation on account of the change, one who buys a tract described as abutting on the street is bound by the release.⁶ Where erections in aid of navigation are lawfully made on public lands, and the lands are afterwards sold, the vendee takes subject to the burden, and cannot have compensation.⁷ But where an unlawful occupation is followed by condemnation,⁸ the owner at the time of condemnation is entitled to compensation.⁹

Where the property in question is sold between the institution

¹ *Harshbarger v. Midland R.*, 131 Ind. 177; *Ballou v. Ballou*, 78 N. Y. 325; *Moore v. Boston*, 8 Cush. 274. See also *Neal v. Knox & L. R.*, 61 Me. 298; *Monterey County v. Cushing*, 83 Cal. 507.

² *McFadden v. Johnson*, 72 Pa. 335; *Warrell v. Wheeling, P. & B. R.*, 130 Pa. 600; *King v. New York*, 102 N. Y. 171; *Hilton v. St. Louis*, 99 Mo. 199; *Dunlap v. Toledo, A. A. & G. T. R.*, 50 Mich. 470; *Milwaukee & N. R. v. Strange*, 63 Wis. 178; *Smith v. Railway Co.*, 88 Tenn. 611; *Indiana, B. & W. R. v. Allen*, 100 Ind. 109; *Sargent v. Machias*, 65 Me. 591. See also *Bridgman v. St. Johnsbury & L. C. R.*, 58 Vt. 198; *Inge v. Police Jury*, 14 La. An. 117; *Wood v. Comm.*, 122 Mass. 394; *Drury v. Midland R.*, 127 Mass. 571; *McLendon v. West Point & A. R.*, 54 Ga. 293; *Hentz v. Long Island R.*, 13 Barb. 646. See *Heilman v. Union Canal Co.*, 50 Pa. 268; *Sweeney v. United States*, 62 Wis. 396.

³ *Walton v. Green Bay, W. & S. P. R.*, 70 Wis. 414; *Hatry v. Painesville & Y. R.*, 1 Ohio C. C. 426.

⁴ See § 387.

⁵ *Evans v. Savannah & W. R.*, 90 Ala. 54. See *Ayres v. Pennsylvania R.*, 48 N. J. L. 44.

⁶ *Patten v. Fitz*, 138 Mass. 456.

⁷ *Black River Imp. Co. v. La Crosse B. & T. Co.*, 54 Wis. 659.

⁸ See § 118.

⁹ *San Antonio & A. R. v. Ruby*, 80 Tex. 172.

and completion of proceedings to condemn, the vendee is entitled to the compensation.¹ Where a lessee of land claims compensation, and the corporation can show that its appropriation was complete before the making of the lease, the claim will be denied, as the right to compensation is wholly in the lessor.² Where an agreement of sale exists at the time of condemnation it is in nowise affected, and the purchaser is entitled to compensation,³ especially where he is in possession, and has paid a large sum on account.⁴

DAMAGES FOR A TRESPASS.

§ 307. The present chapter has been devoted, thus far, chiefly to the subject of compensation for the lawful appropriation of property for public use. The liability of the promoters of public works for trespasses upon private property will now be determined.

§ 308. A critical question in regard to a common-law action of trespass on account of damage from the construction of works of public purpose is, whether a recovery and satisfaction of judgment can effect a result similar to that obtained by proceedings to condemn — whether expropriators may, by paying damages, enjoy thereafter the benefit of their trespass? A brief examination of the common-law action of trespass brought against a private person will help to define the subject. Now although multiplicity of suits is not a substantive ground of jurisdiction at common law, yet it is not a thing to be encouraged. Hence the rule, that where one has suffered an injury, and its effects are all experienced at the time of suit, he shall have but one action. A verdict in this action is so conclusively presumed to cover all damage, that, if a second action be brought, the former recovery may be pleaded in bar. It is necessary then to deter-

¹ *Meginnis v. Nunamaker*, 64 Pa. 374; *Carli v. Stillwater & S. P. R.*, 16 Minn. 260; *Bean v. Warner*, 38 N. H. 247; *Curran v. Shattuck*, 24 Cal. 427. See *Plumer v. Wausau Boom Co.*, 49 Wis. 449.

² *Lawrence's Appeal*, 78 Pa. 365; *Davis v. Titusville & O. C. R.*, 114 Pa. 308.

³ *McIntyre v. Easton & A. R.*, 26 N. J. Eq. 425, *Pinkerton v. Boston & A. R.*, 109 Mass. 527; *Stevenson v. Loehr*, 57 Ill. 509. See *Kuhn v. Freeman*, 15 Kan. 423; *Proprietors of Locks, etc. v. Nashua & L. R.*, 10 Cush. 385.

⁴ *Stokes v. Parker*, 53 N. J. L. 183.

mine whether the injury is single — working all its harm at the time of its commission, or continuing — causing fresh damage every day of its existence. Where the act complained of is simply, an act of destruction, as, for example, the subtraction of soil caused by excavating on adjoining land,¹ there is but a single trespass, and the whole damage can be at once redressed. But if one encroach upon the land of another,² or so deal with his own property as to inflict an injury on other land, which will continue as long as the cause thereof is maintained, as, for example, where A, mining on his own land, floods the land of B,³ there is a continuing injury for which successive actions may be brought. The reasons for this practice are, that if the injured party should receive in one action prospective as well as past damages for a continuing trespass, there would be an assumption of persistence in wrong-doing, an assumption repugnant to the common law, and also a result equally repugnant, — the acquisition of a right by being mulcted in damages for a wrong.

§ 309. What is the measure of damages, and the effect of their payment, when the trespasser is promoting a public work? It appears, that in several decisions the plaintiff in trespass has recovered damages, past and prospective, for an injury which is due to the negligent or improper construction of the work.⁴ But the true doctrine is that the permanency of an abuse of power should not be admitted, but that damages should be recovered from time to time until the nuisance is abated.⁵ The operation of this rule is illustrated in the *Baltimore & Potomac Railroad Company v. Fifth Baptist Church* cases.⁶ In the first case, a judgment for \$4,500 was recovered by the church for injury to its property caused by the unlawful operation of the

¹ *McGuire v. Grant*, 25 N. J. L. 356.

² *McGann v. Hamilton*, 58 Conn. 69.

³ *Darley Main Colliery v. Mitchell*, 11 App. Cas. 127.

⁴ *North Vernon v. Voegler*, 103 Ind. 314; *Fowle v. New Haven & N. Co.*, 112 Mass. 334; *Powers v. Council Bluffs*, 45 Iowa, 652. See also *Lafayette v. Nagle*, 113 Ind. 425.

⁵ *Ohio & M. R. v. Wachter*, 123 Ill.

440; *Wells v. New Haven & N. Co.*, 151 Mass. 46; *Aldworth v. Lynn*, 153 Mass. 53; *Williams v. Water Co.*, 79 Me. 543; *Delaware & R. Canal v. Wright*, 21 N. J. L. 469. See also *Uline v. New York Cent. & H. R. R.*, 101 N. Y. 98; *Brewster v. Sussex R.*, 40 N. J. L. 57; *Thompson v. Pennsylvania R.*, 51 N. J. L. 42; *Cain v. Chicago, R. I. & P. R.*, 54 Iowa, 255.

⁶ 108 U. S. 317; 137 U. S. 568.

railroad on adjacent land. In the second, the company appealed from two judgments (\$6,000 and \$7,000) rendered on the same facts, in suits brought in 1880 and 1883. In answer to the assertion that full compensation had been paid in the first suit, the court declared that the trespass was a continuing one for which successive actions would lie.

The act may be wrongful because done in disregard of powers which could have been exerted to make it lawful,—that is to say, the expropriators trespass where they might have condemned. A strictly utilitarian view has been taken of this case. The action of trespass has been treated as a condemnation proceeding in fact with the parties reversed, a recovery carrying full compensation, and leaving the trespassers with the fruits of their trespass.¹ But the prevailing opinion — ably sustained in *Uline v. New York Central & Hudson River Railroad Co.*² — is that the trespasser can gain nothing by his trespass. The act must be treated as a nuisance, and successive actions may be brought until the cause of injury is legitimated by proper proceedings, or is abated.³ The strict course prescribed by the decisions last cited does not necessarily prevent the expropriators from legitimating a wrongful possession without formal proceedings, for it has been held that a court of equity will make good the possession upon payment of full compensation.⁴ And it has been held further, that an action of trespass may effect a full settlement if both parties agree.⁵

The lawful construction of a public work may cause a consequential injury which is actionable at common law⁶ and for which no remedy is provided by statute. The strict rule of the common law is that in such case successive actions may

¹ *Texas & S. L. R. v. Matthews*, D. R., 18 Minn. 260; *Lamm v. Chicago*, 60 Tex. 215. See also *Cohen v. St. Louis, F. S. & W. R.*, 34 Kan. 158; *West. N. C. R.*, 101 N. C. 526; *Hopkins v. West. Pacific R.*, 50 Cal. 190; *Troy v. Cheshire R.*, 23 N. H. 83, *Danforth, J.*, dissenting, *Uline v. New York Cent. & H. R. R.*, 4 N. E. Rep. 536. 255.

² 101 N. Y. 98.

³ *Carl v. Sheboygan & F. R.*, 46 Wis. 625; *Mahon v. New York Cent. R.*, 24 N. Y. 658; *Pond v. Met. El. Ry.*, 112 N. Y. 186; *Adams v. Hastings &*

⁴ See § 384.

⁵ *Lahr v. Met. El. R.*, 104 N. Y. 268. See also *Porter v. Met. El. R.*, 120 N. Y. 284.

⁶ See §§ 146-152.

be brought until the nuisance is abated.¹ It has been held in other cases, that where a complaint alleges the permanency of a nuisance, a consent to its continuance may be presumed on the condition of payment of compensation for past and prospective injury.²

Where it is enacted that compensation shall be paid for property damaged, or injuriously affected, and no statutory remedy is provided, it has been held that a common-law action shall have the effect of statutory proceedings in this, that a recovery shall be for permanent compensation, and may be pleaded thereafter in bar of another suit.³

§ 310. Where an injury to property is founded on tort, a vendee cannot recover if the trespass is single,⁴ but he can recover if the trespass is a continuing one.⁵ In *Pappenheim v. Metropolitan Elevated Railroad Company*,⁶ the plaintiff was the vendee of premises on a street unlawfully occupied by the company. In response to a claim for damages on account of injury to easements, the company asserted that the right to sue was in the vendor, during whose possession the railway had been built. The court held, that had the vendor filed a bill in equity during his possession the rights of the parties would have been fixed, but that, as this had not been done, the vendee could recover.

§ 311. Where the trespass is single and permanent, the measure of damages is usually the depreciation in the value of the property. The principles by which this depreciation is determined would seem to be not essentially dissimilar to those which govern a regular assessment of compensation. But where the trespass is continuing, evidence of depreciation in value is incompetent, for the permanency of injury is not contemplated, and only such damage can be shown as has been sustained to the date of suit.⁷

¹ *Plate v. New York Cent. R.*, 37 N. Y. 472; *Savannah & O. Canal v. Bourquin*, 51 Ga. 378; *Valley R. v. Franz*, 43 Ohio St. 623.

² *Harmon v. Railroad Co.*, 87 Tenn. 614; *Indiana, B. & W. R. v. Eberle*, 110 Ind. 542. See also *Chicago & E. I. R. v. Loeb*, 118 Ill. 203. See *Fowle v. New Haven & N. Co.*, 112 Mass. 334; *Cent. Branch U. P. R. v. Andrews*, 26 Kan. 702.

³ *Chicago & E. I. R. v. Loeb*, 118 Ill. 203; *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35.

⁴ *Chicago & A. R. v. Maher*, 91 Ill. 312; *Chicago & E. I. R. v. Loeb*, 118 Ill. 203.

⁵ *Donald v. St. Louis, K. C. & N. R.*, 52 Iowa, 411; *Chicago & L. R. v. Hopkins*, 90 Ill. 316.

⁶ 128 N. Y. 436.

⁷ *Keil v. Chartiers Val. Gas Co.*,

It is unnecessary to list all the injuries in question, but it will be profitable to mark the proposition laid down in *Lahr v. Metropolitan Elevated Railway Company*.¹ "No partial justification of the damage inflicted by an unlawful structure or its unlawful use can be predicated upon the circumstance, that under other conditions and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrator liable for damages." It follows, that those whose property is injured by the construction and operation of works unlawfully erected, may recover damages for noise,² vibration,³ and loss of privacy.⁴ Where the unlawful location of a railroad in a street increased the freehold value of abutting property, but lessened the rental value of the property as it stood, damages were allowed for loss in rents, as the corporation was not allowed to set off a benefit founded in trespass.⁵ Where the trespass is an actual occupation of property, the owner should recover the fair rental value of the premises.⁶

Courts have refused to treat a wrongful entry in furtherance of a public work as a malicious trespass punishable by the imposition of exemplary damages.⁷ Thus, where a railroad company entered unlawfully and cut down trees, the penalty of treble damages, fixed by statute for the wilful cutting of another's timber, was not imposed.⁸ The elevated railway companies in the city of New York cannot be compelled to pay exemplary damages for their trespasses upon private rights, as their acts are not referable to a wrong motive.⁹ Under some circumstances the imposition of exemplary damages may be a question for the jury.¹⁰

131 Pa. 466; *Uline v. New York Cent. & H. R. R.*, 101 N. Y. 98. See also *Robb v. Carnegie*, 145 Pa. 324; *McGettigan v. Potts*, 149 Pa. 155.

¹ 104 N. Y. 268.

² *Kane v. New York El. R.*, 125 N. Y. 164.

³ *Ireland v. Met. El. R.* 52 N. Y. Super. 450. But see *Peyser v. Met. El. R.* 13 Daly (N. Y.), 122.

⁴ *Moore v. New York El. R.*, 130 N. Y. 523.

⁵ *Davis v. East Tennessee, V. & G. R.*, 87 Ga. 605.

⁶ *Baltimore & O. R. v. Boyd*, 67 Md. 32; *Chicago v. Huenerbein*, 85 Ill. 594.

⁷ *Baltimore & O. R. v. Boyd*, 63 Md. 325; *Chicago & I. R. v. Baker*, 73 Ill. 316.

⁸ *Bethlehem, etc. Gas Co. v. Yoder*, 112 Pa. 136.

⁹ *Powers v. Manhattan R.*, 120 N. Y. 178.

¹⁰ *Pennsylvania R. v. Eby*, 107 Pa. 166. See also *Rockford & R. I. R. v. Wells*, 66 Ill. 321.

CHAPTER XI.

PROCEDURE.

§ 312. In the preceding chapters the powers of expropriators have been defined. The methods by which these powers are to be exercised will now be explained. The statutes which govern the exercise of the eminent domain are so numerous, so dissimilar in very many respects, that their full consideration would require more space than can be devoted to matters of conventional detail, which, after all, can be mastered only by close study of the statutes themselves. Therefore, we will endeavor to explain the rationale of procedure, and indicate the essential and usual steps prescribed in cases of condemnation, without exhaustive comment on particular statutes.

§ 313. **Nature of Eminent Domain Proceedings.** — The rights and obligations of the eminent domain are usually enforced in proceedings instituted by the expropriators. These are the only true condemnation proceedings. Statutory proceedings at the instance of the owner¹ are, in effect, suits for compensation in respect to a condemnation otherwise complete.

Proceedings to condemn have been termed administrative.² Now administrative law, as it is understood in France, and other continental states, — that is, the law which governs controversies between the citizen and the state, and is administered by the executive, not the judicial department, — is foreign to English and American systems of jurisprudence.³ Nor can a proceeding to condemn be treated by a court of law as an administrative, rather than a judicial proceeding. Hence, where a court, having jurisdiction only within the limits of a city, appointed commis-

¹ See § 362.

² *People v. Smith*, 21 N. Y. 595.

³ Dicey, *Law of the Constitution*, (1st ed.) 180. See Sidgwick, *Elements of Politics*, 480; Goodnow, *Comparative Administrative Law*, I. 6.

sioners to assess compensation for land beyond the limits needed for a park, the appointment was set aside. It was held that the court did not act in an administrative capacity, but attempted to exercise a judicial function in a matter beyond its competency.¹ While proceedings to condemn instituted by the state, or a political corporation, may be administrative in a general sense, they are essentially judicial in an important feature. The assessment of compensation is a judicial act,² and must be performed by a tribunal having the judicial quality of impartiality.³

As the eminent domain acts upon things, not persons, condemnation proceedings have been said to be *in rem*.⁴ This definition is broadly accurate. But there is a marked difference between an ordinary action *in rem*, and a condemnation proceeding. Where a vessel is seized for non-payment for supplies, or land is taken for non-payment of taxes, a thing is taken for the purpose of satisfying a debt, hence the thing may be usually redeemed by payment. But a thing is condemned simply because it is wanted.

§ 314. Condemnation proceedings are of a legal rather than an equitable nature.⁵ But they are sufficiently peculiar to warrant the question whether they are within the purview of statutes dealing with "suits at law," "civil actions," etc. There is no general rule by which the answer may be determined. The courts endeavor to discover the legislative intention in the general law in question, and accordingly place the proceedings within the statute,⁶ or without it.⁷ It is settled, however,

¹ *Matter of Buffalo*, 139 N. Y. 422.

² *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Matter of Buffalo*, 139 N. Y. 422. See § 336.

³ See § 320.

⁴ *Union El. R.*, 112 N. Y. 61; *Brock v. Old Colony R.*, 146 Mass. 194; *Cupp v. Comm.*, 19 Ohio St. 173; *Wright v. Wilson*, 95 Ind. 408; *Crane v. Elizabeth*, 36 N. J. Eq. 339; *St. Paul, M. & M. R. v. Minneapolis*, 35 Minn. 141; *Costello v. Burke*, 63 Iowa, 361.

⁵ See § 380.

⁶ *Lanesborough v. County Comm.*,

22 Pick. 278; *Bass v. Elliott*, 105 Ind. 517; *Scott v. Lassell*, 71 Iowa, 180; *Atlantic & O. R. v. Sullivan*, 5 Ohio St. 276; *St. Louis & S. F. R. v. Brick Co.*, 85 Mo. 307. See also *Hosmer v. Warner*, 15 Gray, 46; *Howard v. Proprietors of Locks, etc.*, 12 Cush. 259.

⁷ *Harrisburg v. Pepper*, 84 Pa. 295; *Henderson v. Adams*, 5 Cush. 610; *Williams v. Taunton*, 126 Mass. 287; *Seattle & M. R. v. O'Meara*, 4 Wash. 17; *Knoth v. Barclay*, 8 Col. 300; *Monongahela Nav. Co. v. Blair*, 20 Pa. 71.

that proceedings to assess compensation are "suits at law," within the purview of federal legislation touching removals from state to federal courts.¹ It is commonly held that they are not "civil actions," as the term, or its equivalent, is used in constitutional declarations of the necessity of a jury trial.² It seems that, where the legislative intention to the contrary is not perfectly clear, proceedings to condemn should be segregated from ordinary actions. They are special proceedings for the exercise of public powers.

Condemnation proceedings should not be entertained save for the object of taking property for public use. Hence, it has been held that where a corporation claims the fee of a tract of land it cannot institute such proceedings for the purpose of quieting title.³ Nor should a city begin proceedings to condemn a tract of land in order to determine whether the title is in the city, or the possessor.⁴

§ 315. **Legislative Control over Procedure.**—The control of the legislature over the mode of condemnation is unfettered, save when qualifications are imposed by the constitution.⁵

The power of the legislature to prescribe proceedings includes the power to alter existing forms, provided vested rights are not impaired. It is usually held that a form of procedure provided by a corporate charter is not a part of the charter contract, and may be changed.⁶

¹ See § 38.

² *Livingston v. New York*, 8 Wend. 85; *Pennsylvania R. v. Lutheran Congregation*, 53 Pa. 445; *Ames v. Lake Superior & M. R.*, 21 Minn. 241; *Kopikus v. Capitol Comm.*, 16 Cal. 248; *Anderson v. Caldwell*, 91 Ind. 451; *Buffalo Bayou, B. & C. R. v. Ferris*, 26 Tex. 588; *Kendall v. Post*, 8 Or. 141. See also *Convers v. Grand Rapids & I. R.*, 18 Mich. 459; *Lower Chatham*, etc. *Drainage Case*, 35 N. J. L. 497. See *Townsend's Case*, 39 N. Y. 171.

³ *Colorado Midland R. v. Croman*, 16 Col. 381. See also *Milwaukee & N. R. v. Strange*, 63 Wis. 178.

⁴ *Matter of Yonkers*, 117 N. Y. 564.

⁵ *Secombe v. Railroad Co.*, 23 Wall.

108; *United States v. Jones*, 109 U. S. 513; *Matter of New York*, 99 N. Y. 569; *Yost's Report*, 17 Pa. 524; *Bachler's Appeal*, 90 Pa. 207; *Ames v. Lake Superior & M. R.*, 21 Minn. 241; *Hercules Iron Works v. Elgin, J. & E. R.*, 141 Ill. 491; *Rothan v. St. Louis, O. H. & C. R.*, 113 Mo. 132.

⁶ *Baltimore & S. R. v. Nesbit*, 10 How. 395; *Long's Appeal*, 87 Pa. 114; *Cincinnati, H. & I. R. v. Clifford*, 113 Ind. 460; *Tracy v. Elizabethtown, L. & B. S. R.*, 85 Ky. 270; *Sherman v. Milwaukee, L. S. & W. R.*, 40 Wis. 645; *United Companies v. Weldon*, 47 N. J. L. 59; *St. Joseph & I. R. v. Shambaugh*, 106 Mo. 557; *North Pacific R. v. Haas*, 2 Wash. 376; *Mitchell v. Illinois & S.*

It has been decided that a change in the constitution in so important a matter as the imposition of heavier liabilities upon those who exercise public powers executes itself.¹ It has been held, also, that where the change is in respect to procedure there need be no legislative action to give it practical effect, but that the new rule becomes operative.² But it has been found in other cases that, while the constitutional declaration repealed the old law, it did not enact a new one, but left this to the legislature.³ It seems that constitutional changes in procedure should not affect proceedings pending, unless this is imperatively demanded by the terms of the declaration.⁴ The power of the legislature to cure defects in proceedings, provided the retroactive law will not affect vested rights, has been exerted in cases of condemnation.⁵

The Tribunal.

§ 316. The tribunal before which proceedings to condemn are conducted is usually a board of commissioners, or a jury.⁶ The constitutions of certain States prescribe that a jury shall assess the compensation,⁷ and determine the necessity for condemnation.⁸ The "jury" referred to in constitutional provision or

L. R., 68 Ill. 286. See also *Williams v. Hartford & N. H. R.*, 13 Conn. 397; *Gowen v. Penobscot R.*, 44 Me. 140.

¹ *McElroy v. Kansas City*, 21 Fed. Rep. 257.

² *Weber v. County of Santa Clara*, 59 Cal. 265.

³ *Lamb v. Lane*, 4 Ohio St. 167. See *Cairo & F. R. v. Trout*, 32 Ark. 17.

⁴ *People v. Supervisors*, 3 Barb. 332. See also *Peoria & R. I. R. v. Birkett*, 62 Ill. 332.

⁵ *Matter of New York*, 49 N. Y. 150; *People v. McDonald*, 69 N. Y. 362; *State v. Bruggeman*, 81 Minn. 493. See also *Spaulding v. Nourse*, 143 Mass. 490.

⁶ In some localities the tribunal consists of "viewers" or "appraisers," but as these bodies are not as a rule specially distinguishable from one or the other of those named in the text, their qualifications and duties will be sufficiently indicated in treating of the tribunal generally.

⁷ In all cases, Iowa, i. 18; Md. iii. 46; Ohio, i. 19; if demanded by the owner, Col. ii. 15, W. Va. xi. 9, except where the state condemns, Ill. ii. 13; where a corporation condemns, Ark. xii. 9; where a municipal or other corporation, or an individual condemns, and then only in cases of appeal, Ala. xiii. 7; Pa. xvi. 8; where an incorporated company is interested, Mo. xii. 4. In case of improvements in cities and villages, Mich. xv. 15; of private roads, Mich. xviii. 14, N. Y. i. 7; of rights of way for corporations other than municipal, Cal. i. 14; of rights of way for corporations, S. C. xii. 6. Commissioners may be substituted for jury, except where jury is expressly required, Mich. xviii. 2, N. Y. i. 7; Mo. ii. 21.

⁸ Except where the state condemns, Mich. xviii. 2. In case of municipal corporations, Wis. xi. 2; of private roads, Mich. xviii. 14; N. Y. i. 7.

statute is usually a common-law jury of twelve men.¹ But if a special jury is the tribunal in vogue at the enactment of the constitution it may be presumed to be the jury intended.² The constitutional requirement in regard to a jury is usually observed when a jury is provided in case of appeal from the judgment of commissioners or other special tribunal.³ In the absence of an express constitutional provision a jury cannot be demanded as a matter of right.⁴

There is no objection, of course, to referring the rights of the parties to the arbitrament of a regular court, and this is sometimes done. Save in the last instance, the tribunal is not technically a judicial one,⁵ but, as will presently appear, it is essentially judicial in this, that it must be impartial, and must preside over a cause in which both parties have the opportunity to be heard.

§ 317. When the constitution prescribes the mode by which the tribunal is to be constituted, it must be strictly followed.⁶ Hence, the appointment of commissioners by a common council is invalid when the power is vested in a court of record.⁷ Nor can a board qualify the discretion of a court by presenting a list of persons from which the court shall select the tribunal.⁸ Where the tribunal is a jury its members are usually selected as in ordinary cases.

Although the duty of appointing commissioners is usually imposed upon a court, it may be performed by the legislature itself,⁹ or the legislature may authorize the executive to appoint.¹⁰ Congress provided that two engineer officers of the army, together

¹ *Smith v. Atlantic & G. W. R.*, 25 Ohio St. 91; *Postal Tel. Co. v. Alabama G. S. R.*, 92 Ala. 331; *Chicago & M. R. v. Sanford*, 23 Mich. 418; *Pearsall v. Supervisors*, 71 Mich. 438. Compare *McManus v. McDonough*, 107 Ill. 95.

² *Baltimore Belt R. v. Baltzell*, 75 Md. 94; *Cruger v. Hudson River R.*, 12 N. Y. 190. (See *Menges v. Albany*, 56 N. Y. 374.)

³ *Tharp v. Witham*, 65 Iowa, 566; *Maxwell v. Comm.*, 119 Ind. 20; *Steuart v. Baltimore*, 7 Md. 500; *Reckner v.*

Warner, 22 Ohio St. 275. See also *Atlanta v. Cent. R.*, 53 Ga. 120.

⁴ *United States v. Engerman*, 46 Fed. Rep. 176; *Morris v. Comptroller*, 54 N. J. L. 268; *Backus v. Lebanon*, 11 N. H. 19; *State v. Lyle*, 100 N. C. 497.

⁵ *Toledo, A. A. & G. T. R. v. Dunlap*, 47 Mich. 456.

⁶ *Matter of Buffalo*, 139 N. Y. 422.

⁷ *House v. Rochester*, 15 Barb. 517.

⁸ *Menges v. Albany*, 56 N. Y. 374.

⁹ *State v. Comm.*, 28 Kan. 431.

¹⁰ *Morris v. Comptroller*, 54 N. J. L. 268.

with three civilians to be appointed by the President with the consent of the Senate, should be a tribunal for assessing compensation. It was objected that the officers were not duly appointed, as the consent of the Senate had not been required. The court held that consent in this case was unnecessary, as the duties imposed upon the officers were germane to their office.¹

The impartiality of the tribunal must be safeguarded by vesting the power of appointment in an impartial body. Hence, it would be unlawful to permit a private corporation to appoint commissioners.² It has been held that a political corporation has such an interest as to disqualify it from appointing,³ but there is no serious objection to permitting the governing body of a town to appoint, in a case where an appeal may be taken from the judgment of the tribunal.⁴

§ 318. The effect of a vacancy in the tribunal depends, in the first place, upon whether the statute contemplates a vacancy, and provides for filling it. If such provision be made, the vacancy must be filled.⁵ And it has been held that where a commissioner dies pending proceedings a successor may be appointed under a statute passed after their commencement.⁶ If there is no statutory provision in respect to vacancies there would seem to be no objection, as a rule, to an appointment by the body which originally exercised the power, providing, and this is the important question, that it is necessary to fill the vacancy in order to preserve the jurisdiction of the tribunal. It has been held, agreeably to the rule that a majority may decide,⁷ that a vacancy in a tribunal exercising public powers does not necessarily impair their jurisdiction if there is still a majority of the original body left.⁸ The subject of a vacancy is further complicated by the question whether, in a case where

¹ *Shoemaker v. United States*, 147 U. S. 282.

² See *Powers v. Bears*, 12 Wis. 213.

³ *Rhine v. McKinney*, 53 Tex. 354; *Lumsden v. Milwaukee*, 8 Wis. 485.

⁴ *Bass v. Ft. Wayne*, 121 Ind. 389. See also *State v. Fond du Lac*, 42 Wis. 287; *McMicken v. Cincinnati*, 4 Ohio St. 394.

⁵ *People v. Van Nostrand*, 46 N. Y. 375.

⁶ *State v. National Docks R.*, 54 N. J. L. 180.

⁷ See § 323.

⁸ *Smith v. New Haven*, 59 Conn. 203; *People v. Syracuse*, 63 N. Y. 291. But see *Wentworth v. Farmington*, 49 N. H. 119.

a full tribunal is necessary, a vacancy should be filled, or the proceedings abandoned and recommenced. It is evident that changes in the personnel of a tribunal, without regard to the state of the cause, may result in a judgment pronounced by persons unfamiliar with all the facts. Hence, it is improper for a jury to fill a vacancy between the view of the property and the assessment of compensation.¹ In the absence of statutory direction as to the proper course in case of a vacancy, it seems advisable for the tribunal to proceed with a majority of the original members; but, if this is unlawful, the vacancy should be filled, unless the alternative course of discontinuance and recommencement is imperatively demanded.

§ 319. *Qualifications of the Tribunal.* — It is frequently prescribed that the tribunal shall be composed of persons within a defined class, such as freeholders, inhabitants of a particular locality, etc. This direction must be closely followed.² In case the statute is silent there is no special qualification for service on the tribunal. But where the property in question is of a peculiar character, it is well that there should be one member, at least, who has special knowledge of it. Thus, for example, where a railroad is laid across another, one familiar with railroads should be appointed on the commission.³

§ 320. An invariable qualification for service upon the tribunal is disinterestedness. Among those disqualified through interest are officers, agents, and stockholders of the corporation,⁴ and others financially interested therein;⁵ petitioners for the proposed improvement, as for example a highway;⁶ owners of

¹ *Gilkerson v. Scott*, 76 Ill. 509.

² *Meacham v. Fitchburg R.*, 3 Cush. 291; *Reed v. Hanover Branch R.*, 105 Mass. 303; *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547; *Grand Rapids v. Grand Rapids & I. R.*, 58 Mich. 641; *North. Pacific T. R. v. Portland*, 14 Or. 24; *Bridgeport v. Giddings*, 43 Conn. 304; *People v. Hynds*, 30 N. Y. 470.

³ *Union Pacific R. v. Leavenworth, N. & S. R.*, 29 Fed. Rep. 728. See also *Gt. West. R. v. Swindon & C. R.*, 22 Ch. D. 677.

⁴ *Powers v. Bears*, 12 Wis. 213; *Peninsular R. v. Howard*, 20 Mich. 18; *Rock Island & A. R. v. Lynch*, 23 Ill. 645. See *People v. First Judge*, etc., 2 Hill, 398; *Commonwealth v. Boston & M. R.*, 3 Cush. 25; *Chesapeake & O. Canal v. Binney*, 4 Cr. C. C. 68; *Strang v. Beloit & N. R.*, 16 Wis. 635.

⁵ *Michigan Air Line R. v. Barnes*, 40 Mich. 383. See *Detroit W. T. & J. R. v. Crane*, 50 Mich. 182.

⁶ *Anthony v. South Kingston*, 13 R. I. 129; *State v. Delesdernier*, 11 Me.

property taken, or affected, by the undertaking in question;¹ near relatives of the parties.² The fact that one is a taxpayer in a political subdivision charged with the duty to pay compensation is not usually considered a cause for disqualification. The interest is too remote.³ Among those who are not competent to serve on the tribunal are one whose son has been given employment by the corporation before the hearing,⁴ and one who has served on the jury in a former proceeding to condemn the property in question.⁵

The competency of officials by whom the expediency of the undertaking is determinable has been sometimes attacked on the score of interest, but generally without success.⁶ In *Foot v. Stiles*,⁷ the matter was thoroughly considered, and it was decided that the functions of a commissioner of highways were ministerial, and that, therefore, he could not be called a judge in his own cause when laying out a highway running in part over his own land.

§ 321. The legislature usually directs the members of a tribunal to qualify by taking an oath of office. Although this direction is always proper, and should, if not expressed, be inferred if possible, its omission will not vitiate the statute.⁸ Where the statute does not prescribe an oath it is proper for the court to do so.⁹ The direction in regard to an oath may be such

473; *Williams v. Mitchell*, 49 Wis. 284; *Thompson v. Multnomah County*, 2 Or. 34. See also *Nescopek Bridge*, 120 Pa. 288. But see *Buckley v. Drake*, 41 Hun, 384.

¹ *State v. Crane*, 36 N. J. L. 394; *State v. Union Township*, 37 N. J. L. 268; *Kundinger v. Saginaw*, 59 Mich. 355. See *Newbecker v. Susquehanna R.*, 1 Pears. (Pa.) Rep. 57; *South Seventh St.*, 48 Barb. 12; *People v. Syracuse*, 63 N. Y. 291; *Haslam v. Galena & S. W. R.*, 64 Ill. 353.

² *Clifford's Case*, 59 Me. 262; *Taylor v. County Comm.*, 105 Mass. 225. See *Albany Northern R. v. Crane*, 7 How. Pr. 164; *Ogden St.*, 63 Hun, 188.

³ *Bridgeport v. Giddings*, 43 Conn. 304; *Baltimore & O. R. v. Pittsburgh,*

W. & K. R., 17 W. Va. 812; *Minneapolis v. Wilkin*, 30 Minn. 140. See also *State v. Crane*, 36 N. J. L. 394. But see *New York v. Manhattan Co.*, 1 Caines, 507; *New Boston*, 49 N. H. 328.

⁴ *New York, W. & B. R. v. Townsend*, 36 Hun, 630.

⁵ *Folmar v. Folmar*, 68 Ala. 120.

⁶ *Chase v. Rutland*, 47 Vt. 393; *Gray v. Middletown*, 56 Vt. 53; *Wilbraham v. County Comm.*, 11 Pick. 322; *Phillips v. County Comm.*, 122 Mass. 258; *Groton v. Hurlburt*, 22 Conn. 178.

⁷ 57 N. Y. 399.

⁸ *State v. Hogue*, 71 Wis. 384. See also *Bradstreet v. Erskine*, 50 Me. 407.

⁹ *Shoemaker v. United States*, 147 U. S. 282.

as to render the proceedings void if it is not followed.¹ The oath taken must conform to the oath prescribed,² although certain verbal inaccuracies have been deemed immaterial.³ The fact that the oath was taken should appear on the record. A statement to the effect that the tribunal was duly sworn has been considered sufficient.⁴ But the better rule is that the record must show that the statutory oath has been administered.⁵

§ 322. **Powers and Duties of the Tribunal.** — The powers of the tribunal are such only as are prescribed by law. The tribunal may be directed to determine the necessity for the undertaking.⁶ Further, it is sometimes invested with a certain control over the manner of condemnation. Thus, commissioners may be authorized to limit the quantity of water to be taken by an aqueduct company, and to fix the times at which it may be drawn.⁷ It has been held that, although the powers of a tribunal directed to assess compensation may include the right to determine the quantity of, and estate in, land to be taken, they will not be so construed as to embrace the power of locating the works.⁸ The invariable, and usually the only, duty of the tribunal is to assess compensation. No other function can be assumed unless the statute so directs.⁹ The report of the tribunal should show that this duty has been duly performed.¹⁰

A strict limitation usually imposed upon these tribunals is that they are not competent to pass upon questions of law.¹¹

¹ *Hoagland v. Culvert*, 20 N. J. L. 387; *Bohlman v. Green Bay & M. R.*, 40 Wis. 157. See *Woolsey v. Supervisors*, 32 Iowa, 130.

² *State v. Bayonne*, 35 N. J. L. 476; *Bowler v. Perrin*, 47 Mich. 154; *Fort St. Depot Co. v. Morton*, 83 Mich. 265. See also *Hays v. Parrish*, 52 Ind. 132; *Merritt v. Portchester*, 71 N. Y. 309; *Bohlman v. Green Bay & M. R.*, 40 Wis. 157.

³ *Hoagland v. Culvert*, 20 N. J. L. 387. See also *Hankins v. Calloway*, 88 Ill. 155.

⁴ *South Abington Road*, 109 Pa. 118; *New Orleans, T. & G. A. R. r. Hemphill*, 35 Miss. 17; *Lyon v. Green Bay & M. R.*, 42 Wis. 538. See *Cambria St.*, 75 Pa. 357.

⁵ *Crossett v. Owens*, 110 Ill. 378; *Walters v. Houck*, 7 Iowa, 72.

⁶ *Grand Rapids v. Grand Rapids & I. R.*, 58 Mich. 641. See § 350.

⁷ *Village of Middletown*, 82 N. Y. 196.

⁸ *New Orleans & P. R. v. Robinson*, 34 La. An. 865.

⁹ *Eckerson v. Haverstraw*, 137 N. Y. 88. See also *Hewett v. County Comm.*, 85 Me. 308.

¹⁰ See §§ 351, 352.

¹¹ *Dep't of Public Parks*, 85 N. Y. 459; *Niagara Falls Man. Co.*, 68 Hun, 391; *McIntyre v. Easton & A. R.*, 26 N.

Hence, in case of a dispute as to the ownership of property they cannot decide the question of title.¹ A jury, whose sole duty is to assess compensation, are not competent to decide whether or not the construction of the undertaking is duly authorized.²

§ 323. As to the meeting of the tribunal, it is only necessary to say that it should be appointed for a definite time and place,³ and held as appointed.⁴ In the absence of direction to the contrary reasonable adjournments may be made,⁵ and, if there are special provisions in respect to adjournment, they must be followed.⁶

When a tribunal is invested with powers to be exercised in the public interests it is essential that all the members should act upon the matter in hand, but a majority may decide. The reason for the rule is that matters of public concern should not be delayed, perhaps indefinitely, by insisting upon unanimity in council.⁷ This rule has been applied, on principle or by statutory direction, both to boards of commissioners by whom the necessity of the work is to be determined,⁸ and to those charged with the duty of assessing compensation.⁹ But, unless the statute plainly permits, the condition that all members of the tribunal must participate will not be relaxed.¹⁰ It has been held,

J. Eq. 425; *Schroeder v. Detroit*, G. H. & M. R., 44 Mich. 387, *Forbes v. Delashmutt*, 68 Iowa, 164; *Girard Ave.*, 11 Phila. 449. See *Davidson v. Boston & M. R.*, 3 Cush. 91.

¹ *Port Huron & S. W. R. v. Voorheis*, 50 Mich. 506. See also *The Queen v. London & N. W. R.*, 3 E. & B. 443; *Matter of Yonkers*, 117 N. Y. 564; *Wilcox v. Oakland*, 49 Cal. 29. Compare *Thurston v. Portland*, 63 Me. 149.

² *Williams v. Brooklyn El. R.*, 126 N. Y. 96.

³ *Minneapolis & S. R. v. Kanne*, 32 Minn. 174.

⁴ *Hobbs v. Comm.*, 103 Ind. 575; *Barlow v. Highway Comm.*, 59 Mich. 443. See *Gill v. Milwaukee & L. W. R.*, 76 Wis. 293.

⁵ See *Polly v. Saratoga & W. R.*, 9 Barb. 449.

⁶ *New York & L. B. R. v. Capner*,

49 N. J. L. 555; *Ruhland v. Supervisors*, 55 Wis. 664. See *Allison v. Comm. of Highways*, 54 Ill. 170.

⁷ *Co. Litt.* 181 b; *Grindley v. Barker*, 1 Bos. & P. 229.

⁸ *Acton v. County Comm.*, 77 Me. 128; *Williams v. Mitchell*, 49 Wis. 284; *State Road*, 60 Pa. 330, *Cupp v. Comm.*, 19 Ohio St. 173.

⁹ *Chad's Ford Turnpike*, 5 Binn. 481; *Rogers' Case*, 7 Cow. 526; *Union Pacific R. v. Burlington R.*, 1 McCrary, C. C. 452; *American Cannel Coal Co. v. Huntingdon, T. & C. R.*, 130 Ind. 98. See also *Rock Island & A. R. v. Lynch*, 23 Ill. 645.

¹⁰ *Beekman v. Jackson County*, 18 Or. 283; *Water Comm. v. Lansing*, 45 N. Y. 19; *Ohio & M. R. v. Barker*, 134 Ill. 470. See *Quayle v. Missouri, K. & T. R.*, 63 Mo. 465; *Avery v. Groton*, 36 Conn. 304; *Wells County Road*, 7 Ohio

however, that the notification of all the members of a board of commissioners will enable a majority to act.¹

§ 324. The impartiality of position required as a qualification for membership of the tribunal must be supplemented by impartiality of action during the course of the proceedings. The reception of *ex parte* communications in respect to the subject-matter of the inquiry has been treated as evidence of partiality.² Where a city condemns it is improper for its attorney to advise the tribunal, and draw up the report.³ It is generally held that the acceptance of entertainment by members of the tribunal from parties interested is not, necessarily, evidence of undue influence,⁴ but indulgence in intoxicating liquor at the expense of petitioners for the improvement has been deemed sufficient cause for setting aside a report in their favor.⁵ It has been held that the acceptance by the commissioners of remuneration in excess of the legal fees for service is not, in itself, proof of corruption,⁶ though the practice has been considered improper.⁷ Where there is no prescribed rate for services, nor an exclusive method for fixing their value, it has been decided that the commissioners may agree with the corporation for a reasonable recompense.⁸ But, in a recent case it was held that where the commissioners were to be paid reasonable rates for service, the amount should be fixed by the court, not by the city.⁹

The Petition.

§ 325. The statute usually prescribes that the intention to condemn shall be shown by a document of some sort. Although

St. 16; Paschall St., 81 Pa. 118; Hays v. Parrish, 52 Ind. 132, Luderman v. Findley, 67 Wis. 86.

¹ Astor v. New York, 62 N. Y. 580; Matter of New York, 99 N. Y. 569. See also State v. Van Geison, 15 N. J. L. 339; People v. Hynda, 30 N. Y. 470.

² Buffalo, N. Y. & P. R., 32 Hun, 289; Peavey v. Wolfborough, 37 N. H. 286, Peckham v. School District, 7 R. I. 545. See Lennox v. Knox & L. R., 62 Me. 322; Blake v. County Comm., 114 Mass. 583; New York, W. S. & B. R., 31 Hun, 440; Spring Garden St., 4 Rawle, 192.

³ Paul v. Detroit, 32 Mich. 108.

⁴ Blake v. County Comm., 114 Mass. 583; Plymouth Road, 5 Rawle, 150; Greene v. East Haddam, 51 Conn. 547; State v. Bergen, 21 N. J. L. 342. But see Magnolia St., 8 Phila. 468.

⁵ Newport Highway, 48 N. H. 433.

⁶ State v. Miller, 23 N. J. L. 383.

⁷ State v. Bergen, 21 N. J. L. 342.

⁸ Lehigh Val. R. v. Dover & R. R., 43 N. J. L. 528. See also Staten Island, etc. R., 41 Hun, 392.

⁹ Green v. St. Louis, 106 Mo. 453.

an oral expression of intention seems to have been deemed sufficient, in the absence of statutory direction,¹ the better opinion is that the necessity for a written expression is always implied.² The form of the document depends on the status of the expropriator. Where proceedings to condemn are instituted by a political corporation, acting of its own motion by virtue of the powers entrusted to it, an order, resolution, or ordinance of the governing body should be promulgated. If a work, a highway for example, is undertaken by a public board or officer, at the request of private persons, the proceedings are usually founded on the written application, and the official order made thereon. In other cases, particularly when private corporations are the actors, the common form is a petition addressed to the proper authorities. As these several documents are directed to the same end, their contents are not sufficiently dissimilar to prevent their consideration under the caption of "the petition."

§ 326. **The Authority to Condemn.**—The authority of the petitioner to condemn should appear by sufficient reference to the statute from which the power is derived.³ If conditions precedent are annexed to the grant of power, compliance should be alleged.⁴ Thus, where an attempt to purchase must precede condemnation, the effort and its failure should be shown.⁵ But where the statute merely requires that the petition shall state that "all preliminary steps have been taken," it is not necessary to specify them.⁶

¹ *Whitworth v. Puckett*, 2 Gratt. 531. See also *Hawkins v. The Justices, etc.*, 12 Lea, 351.

² *Vail v. Morris & E. R.*, 21 N. J. L. 189; *Prichard v. Atkinson*, 3 N. H. 335; *Commonwealth v. Coombs*, 2 Mass. 489; *Church v. Grand Rapids & I. R.*, 70 Ind. 161; *Kroop v. Forman*, 31 Mich. 144; *Lancaster v. Kennebec Co.*, 62 Me. 272.

³ *New York, W. S. & B. R.*, 64 How. Pr. 216; *Montgomery's Case*, 48 Fed. Rep. 896.

⁴ *Fox v. Holcomb*, 34 Mich. 298; *Heck v. School Dist.*, 49 Mich. 551; *Winnebago, etc. Co. v. Wisconsin Midland R.*, 81 Wis. 389; *Citizens Water*

works v. Parry, 59 Hun, 202; *Conaway v. Ascherman*, 94 Ind. 187; *Goodwin v. County Comm.*, 60 Me. 328; *Torrington v. Nash*, 17 Conn. 197; *St. Louis v. Gleason*, 89 Mo. 67; *Lieberman v. Chicago, etc. R.*, 141 Ill. 140.

⁵ *State v. Plainfield*, 41 N. J. L. 138; *Darlington v. United States*, 82 Pa. 382; *Lincoln v. Colusa County*, 28 Cal. 662; *Boston, H. T. & W. R.*, 79 N. Y. 64; *Reed v. Ohio & M. R.* 126 Ill. 48; *Toledo, A. A. & N. M. R. v. Detroit, L. & N. R.*, 62 Mich. 564. See § 124.

⁶ *Rochester R. v. Robinson*, 133 N. Y. 242.

If the statute directs that the publicity of the purpose shall be alleged in the petition the direction must be followed,¹ but the omission of the allegation is cured by an answer denying publicity, and thus making an issue.² In the absence of such a direction it does not seem necessary to assert in terms the publicity of the use,³ unless the undertaking is one which may be either private or public, as, for example, a cemetery, and then it must appear that the latter is the one intended.⁴ But it is essential that the undertaking be described in terms which will bring it within the purview of the statute.⁵

Where it is enacted that a work of public purpose shall not receive the aid of the eminent domain unless its necessity in each case be shown,⁶ the petition or order should allege the necessity.⁷

§ 327. Reference to a preceding chapter will show to what extent alterations in the construction of works are permissible by virtue of the original condemnation.⁸ It follows from the decisions there noted that the expropriators are not bound, ordinarily, to furnish a plan of construction to the owner, unless it is required by the statute,⁹ but may condemn the land for a specified purpose, and use all reasonable means to accomplish it. But the petition must sufficiently inform the owner of the general scope of the undertaking, so that he may know how his property is to be affected.¹⁰ Hence the petition of a telegraph

¹ Cemetery Ass'n v. Redd, 33 W. Va. 262.

² Tracy v. Elizabethtown, L. & B. S. R., 80 Ky. 259.

³ De Buol v. Freeport, F. & M. R. R., 111 Ill. 499. See Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659.

⁴ Cemetery Ass'n v. Redd, 33 W. Va. 262; Evergreen Cemetery Ass'n v. Beecher, 53 Conn. 551. See Cummings v. Peters, 56 Cal. 593.

⁵ Holcomb v. Moore, 4 Allen, 529; Houghton v. Huron Min. Co., 57 Mich. 547; Suver v. Chicago, S. F. & C. R., 123 Ill. 293; Edgewood R. Appeal, 79 Pa. 257; London v. Lumber Co., 91 Ala. 606; Neal v. Mortland, 85 Me. 62.

⁶ See §§ 322, 350.

⁷ Montgomery's Case, 48 Fed. Rep. 896; Union El. Ry., 8 N. Y. Supp. 813; Grove St., 61 Cal. 438; Winnebago, etc. Co. v. Wisconsin Midland R., 81 Wis. 389; Corey v. Swagger, 74 Ind. 211; Colville v. Judy, 73 Mo. 651. See Windsor v. Field, 1 Conn. 279; Sterrett Township Road, 114 Pa. 627.

⁸ See §§ 163, 164.

⁹ Boyd v. Negley, 40 Pa. 377; Brock v. Old Colony R., 146 Mass. 194.

¹⁰ Duke v. Cent. N. J. Tel. Co., 53 N. J. L. 341; Brown v. Rome & D. R., 86 Ala. 206; Mathias v. Carson, 49 Mich. 465; Valley R. v. Bohm, 34

company to condemn the right to erect poles on a turnpike, which does not state on what part of the pike the poles are to be planted, is defective, because the turnpike company are not informed whether or not their franchise is to be affected.¹ Unless the law requires that a railroad corporation shall define the manner in which it proposes to cross another railroad,² it has been held that it may condemn the right to cross generally, subject to the payment of present compensation for the possibility of future alterations of plan.³ The best practice, in cases where the manner of construction is of importance, is to allow the owner to call for a plan, upon the same principle as that which underlies the rule that a defendant may call for a bill of particulars whenever the claim against him is too vague to be properly defended.⁴

As the estate acquired is determined by statute, or by the exigencies of the undertaking, it need not be specified in the petition.⁵

§ 328. **Description of Property.**—As a condemnation proceeding is substantially *in rem*,⁶ the identification of the thing desired is of the utmost importance. Hence, if the petition does not describe the property against which it is directed it is defective.⁷ If the property to be condemned is an easement the land to which it appertains should be described.⁸ Where land to be condemned is affected with a franchise a description of the land, simply, is inadequate. The franchise must be described. Hence, the petition of a railroad company to condemn a right of way

Ohio St. 114; Metropolitan El. R. v. Dominick, 55 Hun, 198. See also New York Cent. R., 66 N. Y. 407; Pasadena v. Stimson, 91 Cal. 238.

⁵ Slingerland v. Newark, 54 N. J. L. 62; Illinois Cent. R. v. Chicago, 138 Ill. 453.

⁶ See § 313.

¹ Trenton & N. B. Turnpike v. American, etc. News Co., 43 N. J. L. 381.

⁷ Vail v. Morris & E. R., 21 N. J. L. 189; Owosso v. Richfield, 80 Mich. 328; Lancaster v. Kennebec Co., 62 Me. 272; Cincinnati, L. & C. R. v. Danville & V. R., 75 Ill. 113; Wilson v. Lynn, 119 Mass. 174. See also Chicago & N. R. v. Chicago, 132 Ill. 372; Kenison v. Arlington, 144 Mass. 456.

² See Toledo, A. A. & N. R. v. Detroit, L. & N. R., 62 Mich. 564; Lake Shore & M. S. R. v. Chicago & W. R., 97 Ill. 506.

³ Nat'l Docks v. United Companies, 53 N. J. L. 217.

⁴ Chicago & N. R. v. Chicago & E. R., 112 Ill. 589.

⁸ New Rochelle Water Co. v. Brush, 47 N. Y. S. R. 388. See Hanford v. St. Paul & D. R., 43 Minn. 104.

across the tracks of another was dismissed, because it described only the land desired.¹

A standard of accuracy of description is hardly obtainable from the decisions, but the following cases will, with those already cited, indicate in a general way the definition of inaccuracy. A description is defective in which the land is described by vague boundaries,² and it has been held that it matters not that a definite location is possible with the data given, if it can be ascertained only by a complicated process of computation.³ A resolution that canal commissioners will make a temporary appropriation of the waters of a lake is too vague.⁴ Notice that a water company will take from a pond not more than seven hundred and fifty thousand gallons a day is sufficiently definite.⁵ Mere uncertainty or ambiguity of description is cured by taking possession of a certain quantity of land with the acquiescence of the owner.⁶ The requirement of accuracy should not be pushed to extremes. A description not drawn with the precision usually found in conveyances may yet sufficiently apprise the owner as to the property wanted.⁷

§ 329. Where a road is to be definitely located by the public authorities upon application made,⁸ it is evident that the applicants are not called upon, indeed they may be unable, to describe accurately the property needed. It is sufficient that the route and terminals are fairly indicated.⁹ Where the relocation of a

¹ Toledo, A. A. & N. M. R. v. Wis. 285; Village of Byron v. Blount, Detroit, L. & N. R., 62 Mich. 564. 97 Ill. 62; Wright v. Wilson, 95 Ind.

² Hinkley v. Hastings, 2 Pick. 162; 408; Lower v. Chicago, B. & Q. R., 59 London v. Lumber Co., 91 Ala. 606; Iowa, 563; Kuschke v. St. Paul, 45 Toledo, A. A. & N. R. v. Munson, 57 Minn. 225; Pasadena v. Stimson, 91 Mich. 42; Nat'l Docks v. United Companies, 53 N. J. L. 217; Midland R. v. Cal. 238; Allen v. Northville, 39 Hun, 240; Cory v. Chicago, B. & K. C. R., 100 Mo. 282. See also Protheroe v. Tottenham, etc. R. (1891), 3 Ch. 278.

³ Warren v. Spencer Water Co., 143 Mass. 9. See McDonald v. Payne, 114 Ind. 359. ⁸ See §§ 102, 330.

⁴ Hayden v. State, 132 N. Y. 533. ⁹ State v. Nelson, 57 Wis. 147; Sterrett Township Road, 114 Pa. 627; State v. Rapp, 39 Minn. 65; Adams v. Co., 82 Me. 335.

⁵ Drury v. Midland R., 127 Mass. 571. ⁶ Harrington, 114 Ind. 66; Packard v. County Comm., 80 Me. 43. See Bennett v. Comm., 56 Mich. 634.

⁷ Cleveland & T. R. v. Prentice, 13 Ohio St. 373; Jackson v. Rankin, 67

well-known street is applied for, the terminals need not be expressly noted.¹

Unless the statute so prescribes the description need not be set out in the petition, provided reference be made to a plan or survey, accessible and definite.²

The name of the owner of the property is not an essential part of the description, and need not be inserted in the absence of statutory direction.³ But this direction when given must be obeyed.⁴

Whenever the liability for consequential injury to property obtains⁵ it is imposed in the interests of the owner, who can take advantage of it only by showing affirmatively what property is injured. Therefore the petitioner is not called upon to describe such land as he may injure, but only such as he needs.⁶ Nor, although the condemnation of a part of a tract is a taking of the whole in that compensation must be paid for damage to the remainder,⁷ does it seem necessary for the petitioner to describe more than the part to be occupied, unless the exact location of the undertaking upon the tract is yet to be made. In any event, the owner may repair an omission by showing the extent of the tract really affected.⁸ But it has been held that if the owner describes a tract in an answer to the petition he must abide by his description, and cannot claim compensation for an additional plot by asserting that the whole constitutes a single farm.⁹

¹ *Hyde Park v. County Comm.*, 117 Mass. 416.

² *Grand Junction R. v. County Comm.*, 14 Gray, 553; *Kohlepp v. West Roxbury*, 120 Mass. 596; *Duke v. Cent. N. J. Tel. Co.*, 53 N. J. L. 341. See also *Comm. Washington Park*, 52 N. Y. 131.

³ *Woodbury v. Marblehead Water Co.*, 145 Mass. 509; *Watkins v. Pickering*, 92 Ind. 332.

⁴ *People v. Whitney's Point*, 32 Hun, 508. See also *Harbeck v. Toledo*, 11 Ohio St. 219; *Comm. Washington Park*, 52 N. Y. 131.

⁵ See §§ 153-157.

⁶ *New Rochelle Water Co. v. Brush*, 47 N. Y. S. R. 388.

⁷ See § 136.

⁸ *Springfield & S. R. v. Calkins*, 90 Mo. 538; *Welch v. Milwaukee & S. P. R.*, 27 Wis. 108; *Atchison & N. R. v. Boerner*, 34 Neb. 240; *Railway Co. v. Hunt*, 51 Ark. 330; *Wilmes v. Minneapolis & N. W. R.*, 29 Minn. 242; *Chicago & I. R. v. Hopkins*, 90 Ill. 316; *Dudley v. Minnesota & N. W. R.*, 77 Iowa, 408. See also *Johnson v. Freeport & M. R.*, 111 Ill. 413; *Southard v. Morris Canal, etc. Co.*, 1 N. J. Eq. 518; *Seward v. Morris Canal, etc. Co.*, 23 N. J. L. 218; *Drury v. Midland R.*, 127 Mass. 571. See *St. Paul & N. R.*, 34 Minn. 227.

⁹ *Northern Pacific & P. S. S. R. v. Coleman*, 3 Wash. 228.

§ 330. The petition should, properly, be signed. But, in the absence of statutory direction, it would seem that a petition duly presented, plainly showing the party interested, would be sufficient, so far as the law of eminent domain is concerned, though in some cases the question might be controlled by general laws in respect to the signing of corporate instruments. Where a highway or other work is to be undertaken upon the petition of persons within a defined class, the classification is usually so simple as to be readily understood by merely referring to the statute. Occasionally, however, there is room for controversy, especially when the classification is based upon interest in property likely to be benefited by the work. Where the petitioners for an improvement must represent the greater interest in the land to be benefited, interest in respect to value, not to area, is meant.¹ The charter of a town authorized the opening of a street upon the petition of a majority of the persons owning lots on a proposed street, such applicants being also the owners of more than one half of the land needed. It also authorized the extension of a street upon the application of a majority of the owners of lots fronting on it. It was held that the latter clause referred to the owners on the existing street, and not to those holding the land needed for the extension.² It has been held that the record must show that the petition has been signed by the proper parties, else the public authorities are without jurisdiction,³ but the more liberal opinion is that an omission to record the qualifications of the applicants is a mere irregularity, to be taken advantage of by motion or demurrer.⁴

§ 331. It is not necessary on principle that the petition should be verified,⁵ but verification is frequently prescribed. An attorney who is acting as an agent of a railroad company in obtaining a right of way is an officer of the company, and may verify the petition.⁶ Where a petition is to be verified by

¹ *Henry v. Thomas*, 119 Mass. 583.

⁵ *Gammell v. Potter*, 2 Iowa, 562.

² *People v. Port Jervis*, 100 N. Y. 283.

See also *Boston, H. T. & W. R.*, 79 N. Y. 64.

³ *Zimmerman v. Snowden*, 88 Mo. 218; *Doody v. Vaughn*, 7 Neb. 28.

⁶ *St. Lawrence & A. R.*, 133 N. Y. 270. See also *New York, L. & W. R.*, 33 Hun, 148.

⁴ *Wells County Road*, 7 Ohio St. 16. See also *Robinson v. Rippey*, 111 Ind. 112; *Cyr v. Dufour*, 68 Me. 492.

a city attorney, or by some one having knowledge of the facts, the attorney may swear that the petition is true to the best of his knowledge and belief.¹ A petition and annexed schedules containing specific descriptions of the property referred to in the petition are practically a single document, so that a verification of the petition verifies the schedules.²

The time and place of filing the petition are matters so thoroughly conventional that it is only necessary to say that the statute should so provide as to render the petition accessible to parties interested, and that its directions to this end should be followed.

§ 332. **Manner of Objecting to the Petition.**—After a petition to condemn has been filed the first question is in what manner should the owner assert any objection he may have to its form or substance, in a case where the statute does not provide a mode of procedure. The chief points of controversy in a proceeding to condemn are the right to condemn, and the measure of compensation. Where the latter is in question there is no necessity for a plea or answer, for the petition presents the issue, and the owner may introduce all pertinent evidence on his side of the case.³ Hence, an answer and cross-bill, alleging an agreement for a certain sum, have been struck out, as the agreement could be shown without pleading it.⁴ But where the owner seeks compensation on account of more land than is described in the petition,⁵ he has been allowed to set up the claim in an answer, or cross-petition.⁶ It has been held that the objection that the land described is unnecessary need not be pleaded.⁷ If the objection to the petition is that it does not disclose a

¹ *Detroit v. Beecher*, 75 Mich. 454.

⁴ *Corbin v. Wisconsin, I. & N. R.*, 66

² *Comm. of Washington Park*, 52 Iowa, 269.

⁵ See § 329.

³ *Gage v. Chicago*, 141 Ill. 642;

Chicago, M. & S. P. R. v. Baker, 102 Mo. 553; *Cincinnati, I. S. & C. R. v. Pfitzer*, *Goebel* (Ohio), 248; *Gerrard v. Omaha, N. & B. H. R.*, 14 Neb. 270.

See also *Bentonville R. v. Stroud*, 45

Ark. 278; *Miller v. Newark*, 35 N. J. L.

460; *Denver & R. G. R. v. Griffith*, 17

Col 598.

⁶ *North. Pacific & P. S. S. R. v. Coleman*, 3 Wash. 228; *Port Huron & S. W. R. v. Voorheis*, 50 Mich. 506. But see *Illinois West. R. v. Mayrand*, 93 Ill. 591.

⁷ *Jefferson & P. R. v. Hazeur*, 7 La. An. 182. See *Tracy v. Elizabethtown, L. & B. S. R.*, 80 Ky. 259.

sufficient authority there is an issue which may be defined by a formal contradiction of some sort, as for example a demurrer,¹ a counter-affidavit,² or an answer.³

Notice.

§ 333. The rule of the common law that no man shall have his rights judicially determined without being accorded the opportunity to be heard in their defence,⁴ is exemplified in the law of eminent domain by the rule that notice must be given to the property owner. The current of authority in favor of this rule is not disturbed by sporadic decisions in which notice of any sort, at any stage of the proceedings, seems to be considered wholly unnecessary.⁵ Assuming that notice is necessary, it can be so only where it is intended to apprise the owner of a judicial investigation in which his rights are at stake, and the outcome of which may be affected by the presentation of his side of the case. What is the owner's side of the case in a proceeding to condemn?

§ 334. We have already referred to the distinction between intrinsic necessity, which is equivalent to publicity of use, and circumstantial necessity, which is merely the expediency of a particular undertaking, and have shown that, while the courts may pass upon the former subject, they cannot control the legislative discretion in regard to the latter.⁶ It follows that in a case where the expediency of an undertaking is within the competency of the legislature, or its agent, the owner of the property affected need not be notified that the question is to be determined. This proposition is illustrated in cases where property is condemned by force of the statute.⁷ So, where a corporation, or board, is authorized to locate an undertaking at discretion, it is not necessary to notify a property owner of a meeting called to decide the question of expediency.⁸ Nor need notice

¹ *New Orleans, M. & T. R. v. South & C. Tel.*, 53 Ala. 211. See *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 67 Cal. 659.

² *New York, L. & W. R.* 99 N. Y. 12.

³ *New Orleans, M. & T. R. v. South & A. Tel.*, 53 Ala. 211.

⁴ *Capel v. Child*, 2 Cr. & J. 558.

⁵ See *Wilson v. Baltimore & P. R.*, 5 Del. Ch. 524; *Johnston v. Joliet & C. R.*, 23 Ill. 202.

⁶ See § 53.

⁷ See § 172.

⁸ *Holt v. Somerville*, 127 Mass. 408;

be given of the consideration of an application for laying out a highway addressed to a board which may grant or refuse the request at its discretion.¹ But if the statute requires that the necessity must be proved in each case, there is a judicial question which should be determined at a hearing of which the owner is notified.² Where the grade of a street cannot be altered without compensation for injury to abutting property³ it has been held that the authorities in making an alteration act judicially, not ministerially, and that the abutter has an interest in the matter which entitles him to notice.⁴ Although a public way has been acquired by user, it has been held that the owners of the land are entitled to notice of proceedings to record it as a highway.⁵

§ 335. The question whether a given purpose is public or private is a judicial one.⁶ It does not follow, however, that an owner of property is entitled to notice of intention to condemn, in order that he may appear and contest the publicity of the proposed use. Such a contest would indeed be impossible in most cases, because the tribunal is frequently composed of laymen, who are not competent to pass upon constitutional questions.⁷ Moreover, the owner is not prejudiced by want of notice, for, as proceedings to condemn for private use are illegal, he may resist at any time such action as may be based upon them.

It has been held that the owner is not entitled, as of right, to be heard in the matter of the appointment of commissioners.⁸

§ 336. It is upon the assessment of compensation that the owner is always entitled to have his day in court. This invaria-

Zimmerman v. Canfield, 42 Ohio St. 463; *Lent v. Tillson*, 72 Cal. 404; *Baltimore & O. R. v. Pittsburgh, W. & K. R.*, 17 W. Va. 812; *Campbell v. Fogg*, 132 Ind. 1.

¹ *People v. Smith*, 21 N. Y. 595.

² *Paul v. Detroit*, 32 Mich. 108; *Pearsall v. Supervisors*, 74 Mich. 558; *Flint v. Fond du Lac*, 42 Wis. 287; *Wood v. Comm. of Highways*, 62 Ill. 391; *People v. Kniskern*, 54 N. Y. 52; *Shelton v. Derby*, 27 Conn. 414. See also *New York Cent. R.*, 66 N. Y. 407.

³ See § 400.

⁴ *Vanatta v. Morristown*, 34 N. J. L. 445.

⁵ *Yelton v. Addison*, 101 Ind. 58.

⁶ See §§ 49, 53.

⁷ See § 322.

⁸ *Village of Middletown*, 82 N. Y. 196; *Morris v. Comptroller*, 54 N. J. L. 268; *Zack v. Pennsylvania R.*, 25 Pa. 394; *Palgrave Min. Co. v. McMillan* (1892) A. C. 460. See also *People v. Mich. South. R.*, 3 Mich. 496; *Gamble v. McCrady*, 75 N. C. 509. But see *Strachan v. Drain Comm.*, 59 Mich. 168; *Union Pacific R. v. Leavenworth, N. & S. R.*, 29 Fed. Rep. 728.

ble duty of the tribunal is essentially judicial, and cannot be properly performed unless the owner is afforded the opportunity to give evidence as to the value of the property taken.¹ Whether the owner has a right to notice of adjournment depends, like his right to original notice, upon his interest in the subject-matter of the trial. Hence, where the power of commissioners as to a change of grade is wholly discretionary they may adjourn a sitting to a certain day, without specifying the hour and place.² If a hearing of which the owner is entitled to notice is adjourned, information of the time and place of the next meeting should be given at the present meeting, or by subsequent notice.³ Where the first course is taken all those who have received original notice are constructively present, and hence are duly notified.⁴

§ 337. **What is Sufficient Notice?** — The form of notice is usually prescribed by the statute, and must be substantially followed.⁵ It is unnecessary to collate the numerous statutory forms, as they are of local interest merely. Our purpose will be subserved by determining the sufficiency of notice in general.

The owner of land through which a private road is to be laid has been held to be entitled to personal notice as of right.⁶ As a rule a constructive notice satisfies the constitutional condition, though the manner of giving it is not uniform. Publication is the usual method of constructive notification, and is effective as to resident,⁷ and non-resident owners.⁸ But a stricter

¹ *United States v. Jones*, 109 U. S. 513; *People v. Gilon*, 121 N. Y. 551; *People v. Tallman*, 36 Barb. 222; *Township of Kearney v. Ballantine*, 54 N. J. L. 194; *Bartlett v. Wilson*, 59 Vt. 23; *Leavitt v. Eastman*, 77 Me. 117; *Chicago & A. R. v. Smith*, 78 Ill. 96; *Potter v. Ames*, 43 Cal. 75; *Lancaster Road*, 68 Pa. 396; *Prichard v. Atkinson*, 3 N. H. 335; *Dickey v. Tennison*, 27 Mo. 373.

² *Kelly v. Baltimore*, 65 Md. 171.

³ *Goodwin v. Wethersfield*, 43 Conn. 437; *Memphis, K & C. R. v. Parsons, etc. Co.*, 26 Kan. 503.

⁴ *Commonwealth v. County Comm.*, 8 Pick. 343; *Supervisors v. Magoon*, 109 Ill. 142.

⁵ *Woolsey v. Supervisors*, 32 Iowa, 130; *Dixon v. Comm.*, 75 Mich. 225; *Rifenburg v. Muskegon*, 83 Mich. 279; *Beatty v. Beethe*, 23 Neb. 210.

⁶ *Redstone Township Road*, 112 Pa. 183.

⁷ *Kuschke v. St. Paul*, 45 Minn. 225; *Baltimore v. Little Sisters of the Poor*, 56 Md. 400; *Owners, etc. v. Albany*, 15 Wend. 373; *Matter of New York*, 99 N. Y. 569; *Cupp v. Comm.*, 19 Ohio St. 173; *Lent v. Tillsen*, 72 Cal. 404; *Winnebago, etc. Co. v. Wisconsin Midland R.*, 81 Wis. 389; *Healey v. Newton*, 119 Mass. 480.

⁸ *Huling v. Kaw Valley R.*, 130 U. S. 559. See *Comm. v. Allen*, 25 Kan. 616.

regard for private rights is evinced in the ruling that where a resident owner is known he must be personally notified.¹ It has been held that a notice, printed in English in a German newspaper, is not published in law, as it does not, presumably, convey information to the readers of the paper. On the other hand, a municipal ordinance is not duly published when it appears in German in a German newspaper, for it has no legal existence except in the language in which it is passed.² The doctrine of constructive notice has been pushed so far, in some cases, as to affect the owner with the general information that his property is to be taken by reason of the action directed against the property itself. Thus, it has been held sufficient notice, to file a location or survey of a railroad right of way,³ or to enter on land and survey a highway.⁴ Further, the technical rules in respect to notice have been brushed aside where it is proved that the owner had actual knowledge of the intended appropriation.⁵

§ 338. A condemnation act which does not provide for notice seems to be considered, in some decisions, as essentially defective.⁶ But the better view is that such an act may be made effective by actually giving proper notice.⁷ An omission to expressly provide for notice has been supplied by inference. Thus, it has been held that notice is plainly intended where the act contemplates the participation of the owner in the proceedings, as where it authorizes him to assist in striking a jury,⁸ or gives him the right to appeal,⁹ or requires that an attempt to purchase shall precede condemnation.¹⁰

¹ *State v. Fond du Lac*, 42 Wis. 287.

See also *Kundinger v. Saginaw*, 59 Mich. 355.

² *North Baptist Church v. Orange*, 54 N. J. L. 111.

³ *Brock v. Old Colony R.*, 146 Mass. 194.

⁴ *Stewart v. Board of Police*, 25 Miss. 479.

⁵ *Wilson v. Baltimore & P. R.*, 5 Del. Ch. 524. See also *Williams v. Hartford & N. H. R.*, 13 Conn. 397. Compare *Rutherford's Case*, 72 Pa. 82.

⁶ See *Kuntz v. Sumption*, 117 Ind. 1; *State v. Fond du Lac*, 42 Wis. 287.

⁷ See *State v. Jersey City*, 24 N. J. L. 662; *State v. Trenton*, 36 N. J. L. 499; *Township of Kearney v. Ballantine*, 54

N. J. L. 194; *Whiteford Township v. Probate Judge*, 53 Mich. 130; *Kramer v. Cleveland*, 5 Ohio St. 140.

⁸ *Swan v. Williams*, 2 Mich. 427; *Baltimore Belt R. v. Baltzell*, 75 Md.

⁹ See *Peoria & R. I. R. v. Warner*, 61 Ill. 52.

¹⁰ *Tracy v. Elizabethtown, L. & B. S.*

The doctrine of notice as generally accepted does not quite insure that effective protection to private rights which one might expect from the great principle upon which it is based. The principle is that no man shall have his rights determined without the opportunity to be heard in their defence. It is often the practice to afford him a constructive opportunity by publication. The practice of publication is certainly proper in some respects. We have seen that condemnation need not be stayed because of doubt or ignorance as to the ownership of the property.¹ So, it should not be stayed by the vexatious pursuit of an absent owner. But it seems just that when an owner is a known resident the expropriator should be compelled to endeavor to notify him personally.

Parties.

§ 339. The persons who should be made parties to condemnation proceedings are those who have interests in the property which cannot be divested constitutionally without notice, and those who are entitled to notice under the terms of the statute. The former are included in the statutory requirement of notice to "owners,"² and may be said, generally, to comprise all those who by the law of the particular jurisdiction have vested estates in the property. The more important applications of this rule have been noticed in determining the responsibility of expropriators with respect to the payment of compensation to the parties entitled.³ Parties are brought into the proceedings by notice, and it is evident that if one entitled by interest is not made a party the proceedings are ineffective as to him. If one applies to be made a party his admission must not be conditioned on his agreeing not to question the regularity of the proceedings, or the rights of the petitioner.⁴

While the execution of public works need not be obstructed, or unreasonably delayed, because the ownership of the property desired is in doubt,⁵ it is the duty of the expropriators to use

R., 80 Ky. 259; *Boonville v. Ormrod's Adm.*, 26 Mo. 193; *Hinckley, Petitioner*, 15 Pick. 447. See *Georges Creek Coal Co. v. New Cent. Coal Co.*, 40 Md. 425.

¹ See § 299.

² See § 340.

³ See §§ 297-306.

⁴ *New York, L. & W. R.*, 26 Hun, 194.

⁵ See § 299.

all reasonable endeavors to discover and notify the true owner. But they are not burdened with a greater responsibility than is assumed by a private purchaser. In making parties they may rely on the record title to land.¹ Nor is it necessary to recognize transfers of property which occur between the institution of proceedings and the assessment of compensation.² It has been held that where an owner, duly notified by publication, dies before the proceedings are completed, his heirs, though non-resident, are bound by the notice.³

§ 340. Statutes authorizing condemnation frequently require that "owners" of property shall be made parties. Under this title have been placed mortgagees⁴ and lessees.⁵ It has been held that as a judgment creditor has no proprietary interest in land, but simply a statutory remedy which may be altered or abolished at any time before rights become vested under it, he need not be made a party as an "owner."⁶ Nor is an owner of a ground rent an "owner" within the meaning of the statute.⁷ The lessee of a stall in a market has not an interest in land. He is a mere licensee.⁸

Where it is enacted that "persons interested" in the property shall be made parties the designation has been held to apply to holders of equitable interests,⁹ and residuary legatees.¹⁰ "Persons

¹ *Brown v. County Comm.*, 12 Met. 208. See *Cool v. Crommet*, 13 Me. 250; *Lawrence v. Nahant*, 136 Mass. 477; *Birge v. Chicago, M. & S. P. R.*, 65 Iowa, 440; *Bell v. Cox*, 122 Ind. 153. See *Chambers v. Carteret & S. R.*, 54 N. J. L. 85.

² *Pickford v. Lynn*, 98 Mass. 491; *Drury v. Midland R.*, 127 Mass. 571; *King v. New York*, 102 N. Y. 171; *Plumer v. Wausau Boom Co.*, 49 Wis. 449. See also *Stewart v. White*, 98 Mo. 226; *Chicago v. Messler*, 38 Fed. Rep. 302. See § 306.

³ *Taylor v. County Comm.*, 18 Pick. 309.

⁴ *Sherwood v. Lafayette*, 109 Ind. 411; *Harrison v. Sabina*, 1 Ohio C. C. 49. But see *Crane v. Elizabeth*, 36 N. J. Eq. 339; *Whiting v. New Haven*, 45 Conn. 303.

⁵ *Parks v. Boston*, 15 Pick. 198; *Giligan v. Providence*, 11 R. I. 258; *Levee Comm. v. Johnson*, 66 Miss. 248; *Baltimore & O. R. v. Thompson*, 10 Md. 76.

⁶ *Watson v. New York Cent. R.*, 47 N. Y. 157; *Gimbel v. Stolte*, 59 Ind. 446; *Bean v. Kulp*, 7 Phila. 650. See *Crane v. Elizabeth*, 36 N. J. Eq. 339. See § 302.

⁷ *Workman v. Miffin*, 30 Pa. 362. See also *Philadelphia, W. & B. R. v. Williams*, 54 Pa. 103.

⁸ *Strickland v. Pennsylvania R.*, 154 Pa. 348.

⁹ *Platt v. Bright*, 29 N. J. Eq. 128; *Calumet River R. v. Brown*, 136 Ill. 322. See also *Mich. Air Line R. v. Barnes*, 40 Mich. 383. See *Hedden v. Davidson*, 51 Cal. 138; *McIntyre v. Easton & A. R.*, 26 N. J. Eq. 425.

¹⁰ *Shelton v. Derby*, 27 Conn. 414.

interested" have been defined to be "individuals having some independent right or interest therein [the legal estate], not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower or curtesy, or encumbrances, such as by judgments or mortgages which are charges or liens on the legal estate."¹ Where a railroad corporation leases merely the right to run its trains over the track of another company it is not a "person interested as owner or otherwise," and need not be made a party to a proceeding to condemn a right to cross the railroad.²

§ 341. *Joinder of Parties.*—If several parties are to be joined in a single proceeding to condemn it must be either because their several properties are needed to further a single public use, or because they are all interested in a single piece of property. It is sometimes enacted that the owners of the several properties desired shall be joined in a single proceeding.³ It has been held, also, that all the owners should be joined in a proceeding where a jury must decide the necessity of the undertaking, as otherwise conflicting decisions might be rendered.⁴ But, unless contemplated by statute, there is, as a rule, no community of interests between owners of several properties. Therefore, one cannot object that owners of other land affected have not been made parties,⁵ that the work in question is improperly located upon another's land,⁶ that compensation has not been assessed to other parties interested,⁷ nor that a new trial has been granted to owners of other land.⁸ Where a railroad company required the use of streets, as well as of private property, a private owner was not permitted to question the condemnation of his own land on the ground that the right to use the streets had not yet been

¹ *State v. Easton & A. R.*, 36 N. J. L. 181. *Grimes v. Coe*, 102 Ind. 406; *Village of Middletown*, 82 N. Y. 196; *Boyd v. Negley*, 40 Pa. 377. See also *Knox v. Epsom*, 56 N. H. 14; *Ives v. East Haven*, 48 Conn. 272.

² *Englewood Connecting R. v. Chicago & E. I. R.*, 117 Ill. 611.

³ *Evergreen Cemetery Ass'n v. Beecher*, 53 Conn. 551; *Duke v. Cent. N. J. Tel. Co.*, 53 N. J. L. 341.

⁴ *Houghton v. Huron Min. Co.*, 57 Mich. 547.

⁵ *Nichols v. Salem*, 14 Gray, 490;

⁶ *Newton v. Agricultural Branch R.*, 15 Gray, 27.

⁷ *Clifford v. Eagle*, 35 Ill. 444. But see *McKee v. Hull*, 69 Wis. 657.

⁸ *Gage v. Chicago*, 141 Ill. 642.

gained, but an order was made that title to the private property should not pass until this right was obtained.¹

§ 342. Where there are several persons holding such interests in the property condemned as necessitate their being made parties, there is certainly no impropriety in joining them, and usually it would seem to be good practice to do so. It has been held that all tenants in common should be joined in a single proceeding,² and should join as complainants where compensation is recoverable by suit.³ Where land is held by husband and wife in joint tenancy, proceedings to condemn a perpetual easement, to which the husband only is made a party, are efficient to divest his interest. The wife may enjoin the corporation until her interest is legally divested, and this though the husband has during her life the sole use of the land, for the right to use does not include the right to depreciate the possible interest of the wife as survivor.⁴ Where property of a corporation is to be taken the individual stockholders need not be made parties.⁵

Conduct of the Cause.

§ 343. Where the tribunal is a special one, and the statute does not prescribe the method by which the cause shall be conducted, it is safe to say that the method should conform, as nearly as possible, to that by which a cause is tried before a court of law. Where the tribunal is a common-law jury, supervised by a court, the mode of procedure usually conforms to that of an ordinary trial. In instructing a jury in condemnation proceedings the judge is governed by the usual rules as to impartiality of statement, and correctness of legal principles.⁶

Where expropriators are obliged to show the necessity of the undertaking, or any other fact prerequisite to condemnation,

¹ New York Cent. & H. R. R. 77 *Bowman v. Venice & C. R.*, 102 Ill. N. Y. 248. 459.

² *Kohl v. United States*, 91 U. S. 367; *Grand Rapids, N. & L. S. R. v. Alley*, 34 Mich. 16; *Watson v. Milwaukee & M. R.*, 57 Wis. 332. See 369.

Dyckman v. New York, 5 N. Y. 434; *Stevens v. Battell*, 49 Conn. 156; *Whitcher v. Benton*, 48 N. H. 157; ³ *Phillips v. Sherman*, 61 Me. 548. ⁴ *Grosser v. Rochester*, 60 Hun. 379. ⁵ *Paice v. Somersworth*, 10 N. H. 369. ⁶ *Seefeld v. Chicago, M. & S. P. R.*, 67 Wis. 96; *Dupuis v. Chicago & N. W. R.*, 115 Ill. 97; *Kiernan v. Chi-*

they bear the burden of proof, and hence are entitled to open and close.¹ Where the question is simply as to the amount of compensation it is frequently held that the owner should open and close, because he claims unliquidated damages,² and the same course is approved upon the hearing of an appeal.³ But in some States it is decided that the expropriators should open and close.⁴ The argument in support of this position is that, in the absence of proof by either party, the tribunal could not put the expropriators in possession of the property on payment of nominal compensation, and that, therefore, the party who would be defeated through lack of proof should open and close.

Evidence.

§ 344. This subject has been considered in detail in listing the elements of compensation. It is important, however, to determine the general principles which govern the admission of testimony in the trial of the cause. The rules of evidence which govern the course of an ordinary trial are not altogether pertinent in special proceedings for the assessment of compensation. Where the assessment is made by a lay tribunal, not acting under the supervision of a court, the technical rules of evidence need not be strictly observed. Information as to the value of the property may be obtained in any reasonable manner.⁵

Conformity to the established rules of evidence comports with a wide range of inquiry in proceedings to condemn. The

cago, S. F. & C. R., 123 Ill. 188; Clay- 88 Cal. 50. See Albany North. R. v. ton v. Chicago, I. & D. R., 67 Iowa, 238. Lansing, 16 Barb. 68.

¹ Baltimore & O. R. v. Pittsburgh, W. & K. R., 17 W. Va. 812; Neff v. Reed, 98 Ind. 341. See also Spring Valley Water Works v. Drinkhouse, 92 Cal. 528; New York Cent. R., 66 N. Y. 407; Wisconsin Cent. R. v. Cornell University, 52 Wis. 537.

² Burt v. Wigglesworth, 117 Mass. 302; New York, L. & W. R., 33 Hun, 148; Colorado Cent. R. v. Allen, 13 Col. 229; Springfield & M. R. v. Rhea, 44 Ark. 258; Baltimore & O. R. v. Pittsburgh, W. & K. R., 17 W. Va. 812; Conwell v. Tate, 107 Ind. 171. See also San Diego Land, etc. Co. v. Neale, 88 Cal. 50. See Albany North. R. v. Lansing, 16 Barb. 68.

³ Connecticut River R. v. Clapp, 1 Cush. 559; Indiana, B. & W. R. v. Cook, 102 Ind. 133; Minnesota Val. R. v. Doran, 17 Minn. 188.

⁴ Neff v. Cincinnati, 32 Ohio St. 215; Montgomery Southern R. v. Sayre, 72 Ala. 443; South Park Comm. v. Trustees, 107 Ill. 489.

⁵ Readington v. Dilley, 24 N. J. L. 209; Columbia Delaware Bridge v. Geisse, 36 N. J. L. 537; William & Anthony Streets, 19 Wend. 678; New York, L. & W. R. v. Arnot, 27 Hun, 151; Staten Island Rapid Trans. Co., 47 Hun, 396.

pith of the law of evidence is that the best proof of relevant matter must be adduced. Now it so happens that the objective point in an ordinary action can be better determined by fact than by opinion, hence the superiority of fact. But where the value of property is in question, opinion evidence is admissible as tending to elucidate the very point at issue, for value is an opinion of worth.¹ As the chief duty of the tribunal is to estimate the value of something condemned, opinion evidence is admitted in accordance with the above rule.

A witness may be examined in respect to his competency.² The competency of witnesses is largely within the discretion of the presiding judge.³

As it is the duty of the tribunal to declare its own estimate of compensation, it is clear that the opinions of witnesses bearing on the question are intended to assist the judgment of the tribunal, not to bind it.⁴ But it is equally clear that the testimony of competent persons should not be arbitrarily disregarded.⁵

§ 345. **Expert Witnesses.** — The position of expert testimony⁶ in condemnation proceedings is not always made clear. A tribunal of assessment may be confronted by problems in the valuation of property the solution of which calls for expert testimony. The property itself may be of an uncommon character. Thus, a railroad franchise, a mine, or other peculiar property may well call for an expert opinion in respect to the elements which

¹ See *Clark v. Baird*, 9 N. Y. 183; *P. R.*, 44 Minn. 195; *Tel. Cable Co. v. Kellogg v. Krauser*, 14 S. & R. 137.

² *Schnylkill Riv. R. v. Stocker*, 128 Pa. 233; *Boston & W. R. v. Old Colony & F. R. R.*, 3 Allen, 142; *Whitney v. Boston*, 98 Mass. 312; *Chicago, K. & N. R. v. Stewart*, 47 Kan. 704. See *Finch v. Chicago, M. & S. P. R.*, 46 Minn. 250.

³ *Montana R. v. Warren*, 137 U. S. 348; *Phillips v. Marblehead*, 148 Mass. 326; *Neilson v. Chicago, M. & N. R.*, 58 Wis. 516.

⁴ *McReynolds v. Burlington & O. R.*, 106 Ill. 152; *Patterson v. Boston*, 20 Pick. 159; *Western Pacific R. v. Reed*, 35 Cal. 621; *Papooshek v. Winona & S.*

P. R., 44 Minn. 195; *Tel. Cable Co. v. Railway Co.*, 43 La. An. 522; *Oregon & C. R. v. Barlow*, 3 Or. 311; *Princeton v. Gieske*, 93 Ind. 102; *Grand Rapids, L. & D. R. v. Chesebro*, 74 Mich. 466.

⁵ *Shoemaker v. United States*, 147 U. S. 282; *City of Kansas v. Baird*, 98 Mo. 215; *Washburn v. Milwaukee & L. R.*, 59 Wis. 364; *Grand Rapids v. Perkins*, 78 Mich. 93; *Hoffman v. Bloomsburg R.*, 143 Pa. 503; *Peoria Gas Light Co. v. Peoria, etc. R.*, 146 Ill. 372.

⁶ "The non-expert testifies as to conclusions which may be verified by the adjudicating tribunal, — the expert to conclusions which cannot be so verified." *Wharton, Evidence*, § 434.

make up its value.¹ The effect of the undertaking upon the property may be beyond the unaided comprehension of the tribunal. In this event the opinion of an expert engineer is admissible on the question whether or not the land is damaged by the construction of the work,² and, if injury is done, the cause and extent of it.³ An insurance agent has been permitted to give his opinion as to the risk to property due to the proximity of a railroad, although he did not profess to be an expert.⁴ It has been held that where a farm is cut by a railroad a farmer may be an expert witness on the single question as to the effect of the intersection from the agricultural standpoint.⁵ Where the testimony of a professed expert is based on mere theory and conjecture it should be disregarded.⁶

Expert evidence should not be received upon speculative questions, or on matters presumably within the comprehension of the tribunal. It has been held that there is no such thing as expert evidence as to the effect of smoke, noise, and vibration upon the value of land, as this the commissioners are fully able to determine for themselves.⁷ Although an expert may testify in respect to the existence of a mineral deposit, he should not be called upon to value the future use to which the land is adapted by reason of the deposit.⁸ In a recent railroad case,⁹ a witness called as an expert was asked what, in his opinion, was the present worth of the property, and what it would have been worth had not the railroad been built. The court ruled that, while expert testimony as to actual value was often admissible, it should not be received upon a speculative question which the jury were at least as competent to pass upon as the witness.¹⁰ As the value of

¹ *Brown v. Comm. for Railways*, 15 App. Cas. 240. See *Clark v. Rockland Water Power Co.*, 52 Me. 68.

² *Moyer v. New York Cent. R.*, 98 N. Y. 645. See *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Chicago, K. & W. R. v. Donelson*, 45 Kan. 189; *Miller v. Weber*, 1 Ohio C. C. 130.

³ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Wilson v. Scranton*, 141 Pa. 621.

⁴ *Webber v. Eastern R.*, 2 Met. 147.

⁵ *Pennsylvania R. v. Root*, 53 N. J. L. 253.

⁶ *Peoria & P. U. R. v. Peoria & F. R.*, 105 Ill. 110.

⁷ *Thompson v. Pennsylvania R.*, 51 N. J. L. 42; *Pennsylvania R. v. Root*, 53 N. J. L. 253.

⁸ *Packard v. Bergen Neck R.*, 54 N. J. L. 553.

⁹ *Roberts v. N. Y. El. Ry.*, 128 N. Y. 455.

¹⁰ See also *Gray v. Manhattan El. R.*, 128 N. Y. 499; *Jefferson v. New York El. R.*, 132 N. Y. 483.

the reversion of land affected with a railroad easement depends on the duration of the railroad use it is clearly beyond the range of expert testimony.¹

§ 346. **Ordinary Witnesses to Value.** — It has been held that the estimation of the market value of land is not a matter of science or skill requiring the offices of an expert.² On the other hand, courts have admitted what is called expert testimony in respect to value.³ Now all opinion evidence is expert, in the broad sense that it is based upon knowledge of the subject-matter, and the greater the experience of an intelligent witness the more weighty is his testimony. Therefore, a tribunal whose duty it is to assess compensation for property taken for public use may consider valuations placed upon it by persons whose callings render them familiar with the sort of property in question. Among such witnesses are real estate agents⁴ and tax-assessors.⁵ A farmer may be a competent witness to the value of farm land.⁶ But it is not necessary that a person should follow a particular calling in order to qualify him to testify to the value of property. Any one having a fair knowledge of values is competent.⁷

Where a part of a tract is taken, it has been decided that a witness may express his opinion as to the amount of damage or benefit due to the undertaking,⁸ though he should not state

¹ *Boston & W. R. v. Old Colony & F. R. R.*, 3 Allen, 142. *Iowa*, 132; *Kansas City & S. W. R. v. Ehret*, 41 Kan. 22; *Curtin v. Nittany*

² *Pennsylvania & N. Y. R. v. Bunnell*, 81 Pa. 414; *Jones v. Erie & W. R.*, 151 Pa. 30; *Swan v. Middlesex*, 101 Mass. 173; *Cherokee v. Town Lot, etc. Co.*, 52 Iowa, 279. See also *Johnson v. Freeport & M. R.*, 111 Ill. 413. ⁷ *Pennsylvania & N. Y. R. v. Bunnell*, 81 Pa. 414; *Pittsburgh & L. E. R. v. Robinson*, 95 Pa. 426; *Chicago, P. & S. L. R. v. Nix*, 137 Ill. 141.

³ *Republican Val. R. v. Arnold*, 13 Neb. 485; *Choteau v. St. Louis*, 8 Mo. App. 48; *Brown v. Providence & S. R.*, 12 R. I. 238. ⁸ *Tucker v. Mass. Cent. R.*, 118 Mass. 546; *Snow v. Boston & M. R.*, 65 Me. 230; *Chicago, P. & St. L. R. v. Nix*, 137 Ill. 141; *Hine v. New York El. R.*, 36 Hun, 293; *Railroad Co. v. Foreman*, 24 W. Va. 662; *Sherman v. St. Paul, M. & M. R.*, 30 Minn. 227; *Burlington & N. R. v. White*, 28 Neb. 166. See *Rochester & S. R. v. Budlong*, 6 How. Pr. 467; *Somerville & E. R. v. Doughty*, 22 N. J. L. 495.

⁴ *Schuykill, etc. R. v. Stocker*, 128 Pa. 233. See also *Lawrence v. Boston*, 119 Mass. 126; *Laing v. United N. J. R.*, 54 N. J. L. 576.

⁵ *Sexton v. North Bridgewater*, 116 Mass. 200.

⁶ *Ball v. Keokuk & N. W. R.*, 74

separate items of damage, but should confine himself to the general depreciation.¹ On the other hand, it has been held that a direct question as to the amount of damage or benefit cannot be put to a witness, because that is the very question the tribunal is to decide, but that his opinion may be asked as to the difference in value before and after the location of the undertaking.²

§ 347. *View*.—A corporation lawfully entered upon land pending an appeal from the award. The compensation was found to be excessive, and a new trial was granted. The owner objected to the new trial on the ground that the corporation had destroyed one building, and suffered another to fall into ruin, and that therefore a view of the property in the state in which it was condemned was rendered impossible. The objection was dismissed. The court held that a view was not necessary.³ It is frequently enacted, however, that the tribunal shall, or may, assist their judgment in respect to compensation by viewing the premises to be condemned. Even in the absence of statutory provision a judge may direct a view,⁴ and there is no reason why a tribunal, not under judicial supervision, should not view the property of their own motion.⁵ Where persons have forcibly prevented arbitrators from entering upon their premises they cannot of course object that a proper view was not taken.⁶ It has been held that the view is to be taken in order to better understand the testimony offered, rather than to obtain the independent evidence of the senses.⁷ But the better opinion, especially where the tribunal is composed of persons selected for their special competency in

¹ New York, W. S. & B. R., 29 Hun, 609.

⁴ Springer v. Chicago, 135 Ill. 552.

² Railway Co. v. Gardner, 45 Ohio St. 309; Brunswick & A. R. v. McLaren, 47 Ga. 546; Alabama & F. R. v. Burkett, 42 Ala. 83; Hartley v. Keokuk & N. W. R., 52 N. W. Rep. 352 (Iowa, 1892); Yost v. Conroy, 92 Ind. 464; Brown v. Providence & S. R., 12 R. I. 238. See Elizabethtown & P. R. v. Helm, 8 Bush, 681.

⁵ Readington v. Dilley, 24 N. J. L. 209.

⁶ Palgrave Min. Co. v. McMillan (1892), A. C. 460.

⁷ Flower v. Baltimore & P. R., 132 Pa. 524; Washburn v. Milwaukee & L. R., 59 Wis. 364; Seefeld v. Chicago, M. & S. P. R., 67 Wis. 96; Heady v. Vevay, etc. Turnpike, 52 Ind. 117; Chicago, K. & W. R. v. Mouriquand, 45 Kan. 170.

⁸ Atchison, T. & S. F. R. v. Schneider, 127 Ill. 144.

the matter of assessment, is that the view is evidence.¹ Agreeably to this opinion the tribunal may, by personal examination, discredit the weight of testimony,² though they cannot arbitrarily supplant the testimony by their view.³

§ 348. **Documentary Evidence.** — The question before the tribunal is not usually such as is elucidated by documentary evidence. But where such evidence is pertinent it should be received.⁴ Computations of the area of the property in question, made by an engineer, may be given to a jury as a memorandum.⁵ The landowner has been allowed to offer an unrecorded plat of his land, made before condemnation, for the purpose of showing its projected division into building lots.⁶ Where compensation is to be assessed for injuries inflicted by a railroad in a street upon abutting property, a city ordinance regulating the speed of trains, etc. may be offered in evidence, as tending to show the manner of use.⁷ On a petition to assess compensation for land taken for a railroad the corporation offered in evidence an executive document of the United States Senate, containing a report of a preliminary survey of the War Department covering the land in question, for the purpose of showing that the construction of the railroad embankment conferred a special benefit upon the property by protecting it from the sea. The evidence was excluded, because the acts of the engineers were not acts of state, nor the facts in the report public facts.⁸

§ 349. **Evidence as to Necessity of Works.** — It has been held that opinion evidence as to the utility of the proposed work is not admissible.⁹ In deciding upon the utility of a proposed

¹ *Wakefield v. Boston & M. R.*, 63 Me. 385; *Remy v. Municipality No 2*, 12 La. An. 500; *Springfield v. Dalby*, 139 Ill. 34.

² *Kiernan v. Chicago, S. F. & C. R.*, 123 Ill. 188. See also *Boston Road*, 27 Hun, 409; *Kings County El. R.*, 15 N. Y. Supp. 516; *City of Kansas v. Butterfield*, 89 Mo. 646; *Parks v. Boston*, 15 Pick. 198; *Barbadoes St.*, 8 Phila. 498.

³ *Grand Rapids v. Perkins*, 78 Mich. 93.

⁴ *Pennsylvania Canal v. Dunkel*, 101 Pa. 103; *Dwight v. County Comm.*, 11 Cush. 201; *Rippe v. Chicago, D. & M. R.*, 23 Minn. 18.

⁵ *Neff v. Cincinnati*, 32 Ohio St. 215.

⁶ *Cincinnati & S. R. v. Longworth*, 30 Ohio St. 108.

⁷ *Mix v. Lafayette, B. & M. R.*, 67 Ill. 319.

⁸ *Cushing v. Nantasket Beach R.*, 143 Mass. 77.

⁹ *People v. Burton*, 65 N. Y. 452;

road under a railroad trestle, the viewers are not bound to consider that, in the event of filling the trestle so as to make a solid embankment, the township will have to pay for the necessary culvert.¹

The Report.

§ 350. The decision of the tribunal should be so expressed as to make a part of the record of the proceedings. The title of the decision depends generally on the character of the tribunal. The conclusions of a jury are usually embodied in a *verdict*, while those of commissioners are expressed in a *report*, or *award*. As these conclusions are not essentially dissimilar, as a rule, they will be considered together under the title of the *report*. The report should recite such facts as are necessary to show the jurisdiction of the tribunal in the premises.²

The requirement that the tribunal shall find that the undertaking is necessary³ is satisfied by the following reports,⁴—that there is occasion for a road,⁵ that a road “ought to be laid.”⁶ It is not satisfied by a report that a road should be established,⁷ that a road will be of public utility if opened at the expense of the petitioners,⁸ that it is necessary to take the land for the purpose of operating and constructing a railroad.⁹ It has been held that a conditional report may be made, where the necessity depends on the settlement of a legal question. Thus, a board of selectmen properly reported that a road to a pond was necessary if the public had the right to fish therein, but not necessary if the fishery were private.¹⁰ The Supreme Court of Michigan have decided that a jury must find that the public benefit of an undertaking will at least offset its cost to the public, else there is no necessity.¹¹

Thompson v. Deprez, 96 Ind. 67. See 534; Morgan's Appeal, 39 Mich. 675; Deitrichs v. Lincoln & N. W. R., 13 Hunter v. Newport, 5 R. I. 325. Neb. 361.

¹ Kingston Township Road, 134 Pa. 409.

² Stout v. Freeholders, 25 N. J. L. 202; Central Pacific R. v. Pearson, 35 Cal. 247; Rex v. Croke, Cowper, 26.

³ See §§ 322, 326, 350.

⁴ See also Heagy v. Black, 90 Ind.

⁵ Pocopson Road, 16 Pa. 15.

⁶ Pierce v. Southbury, 29 Conn. 490.

⁷ Rundle v. Blakeslee, 47 Mich. 575.

⁸ Wilson v. Whitsell, 24 Ind. 306.

See Thurman v. Emmerson, 4 Bibb, 279.

⁹ Grand Rapids, N. & L. S. R. v. Van Driele, 24 Mich. 409.

¹⁰ Turner v. Selectmen, 61 Conn. 175.

¹¹ Detroit v. Beecher, 75 Mich. 454.

There must not be a substantial variation between the undertaking described in the petition, and that which is reported to be necessary. Thus, where a road from A to B is petitioned for, a report in favor of a road from A to C is ineffective.¹ Where the trustees of a village are petitioned to lay out a street upon a certain course they cannot report in favor of a course one rod further to the east.²

The report should plainly designate the property condemned.³ The property described in the report must be the property described in the petition.⁴ Where proceedings are instituted to condemn a right of way for a telegraph plant, between given points on the line of a railroad, a report, fixing compensation at so much a mile for each mile that the telegraph company may cover, will be set aside.⁵

§ 351. **The Award of Compensation.** — The award should be in money only,⁶ and should be definite.⁷ Hence, a report that compensation need not be paid, provided that a sufficient quantity of water for ordinary and farm purposes continue to flow in certain streams, is void for uncertainty.⁸ The fact that a party is not entitled to compensation need not appear in the report, in the absence of statutory direction.⁹ If the statute requires that compensation be awarded to the owner by name it must be obeyed.¹⁰

Where several properties are condemned in one proceeding the report should show the amounts to which the several owners

¹ Twenty-eighth St., 11 Phila. 436.

² *People v. Whitney's Point*, 102 N. Y. 81. See also *Powell v. Hitchner*, 32 N. J. L. 211.

³ *Smith v. Trenton Del. Falls Co.*, 17 N. J. L. 5; *Northern R. v. Concord & C. R.*, 27 N. H. 183; *Jeffries v. Swampscott*, 105 Mass. 535; *Missouri Pacific R. v. Carter*, 85 Mo. 448; *Ohio River R. v. Harness*, 24 W. Va. 511; *Pennsylvania R. v. Bruner*, 55 Pa. 318.

⁴ *Chicago & N. W. R. v. Chicago*, 132 Ill. 372; *Spofford v. Bucksport & B. R.*, 66 Me. 26. See *Bigaouette v. North Shore R.*, 17 Can. S. C. 363.

⁵ *Postal Tel. Co. v. Louisville, N. O. & T. R.*, 43 La. An. 522.

⁶ See § 224.

⁷ *Connecticut River R. v. Clapp*, 1 Cush. 559; *Ives v. East Haven*, 48 Conn. 272; *Winchester & P. R. v. Washington*, 1 Rob. (Va.) 67. See *Palgrave Min. Co. v. McMillan* (1892), A. C. 460.

⁸ *McCord v. Sylvester*, 32 Wis. 451.

⁹ *Point No Point Road*, 2 S. & R. 277; *Kingston Township Road*, 134 Pa. 409; *Childs v. Franklin County*, 128 Mass. 97; *Howland v. County Comm.*, 49 Me. 143. See also *Granger v. Syracuse*, 38 How. Pr. 308.

¹⁰ *Flatbush Ave.*, 1 Barb. 286; *State v. Pierson*, 37 N. J. L. 363; *Kearaley v. Gibbs*, 44 N. J. L. 169.

are entitled,¹ and, where there are several tracts belonging to one person, it is the better practice to report specific compensation for each tract.² Where a single tract, subject to several estates or interests, is condemned, the practice as to the award is largely regulated by the nature of the interests. If these are such that their relative values are mere matters of computation, it is proper for the tribunal to apportion the compensation.³ But, agreeably to the rule that the tribunal is ordinarily the judge of fact, not of law,⁴ the award should be in gross wherever the interests and their values are determinable by legal or equitable rules, and should be afterwards apportioned by a court.⁵ Where the parties interested are joint tenants or tenants in common a gross award has been approved.⁶

§ 352. It has been held that, unless the statute so prescribe, the report need not distinguish between compensation for land actually taken, and for injuries to the remainder of the tract.⁷ But it is certainly the better practice to separate these items of compensation,⁸ and if the law requires the independent valuation of each part⁹ the report must, of course, show compliance.¹⁰ It has been held that the compensation for several injuries to one tract need not be itemized.¹¹ But the compensation should be itemized where the injuries are so independent that an appellate tribunal cannot fairly pass upon the adequacy of compensa-

¹ *Grayville & M. R. v. Christy*, 92 Ill. 337. See *Rusch v. Milwaukee, L. S. & W. R.*, 54 Wis. 136; *Brimmer v. Boston*, 102 Mass. 19. 336. See *Knauff v. St. Paul, S. & T. F. R.*, 22 Minn. 173; *Ruppert v. C. O. & S. J. R.*, 43 Iowa, 490.

² See *Kankakee & I. R. R. v. Chester*, 62 Ill. 235; *Sherwood v. St. Paul & C. R.*, 21 Minn. 122. ⁷ *Packard v. Bergen Neck R.*, 54 N. J. L. 553; *Monterey County v. Cushing*, 83 Cal. 507; *Wabash, S. L. & P. R. v. McDougall*, 126 Ill. 111.

³ *Matter of New York*, 99 N. Y. 569; *Getz v. Philadelphia & R. R.*, 105 Pa. 547; *Rentz v. Detroit*, 48 Mich. 544. See also *State v. Fischer*, 26 N. J. L. 129. See *Thornton v. North Providence*, 6 R. I. 433. ⁸ *Trenton Water Power Co. v. Chambers*, 13 N. J. Eq. 199; *New Orleans, F. & G. R. v. Barton*, 43 La. An. 171.

⁴ See § 322. ⁹ See § 272. ¹⁰ See *Illinois West. R. v. Mayrand*, 93 Ill. 591.

⁵ *Ross v. Elizabethtown & S. R.*, 20 N. J. L. 230. See also *South Park Comm. v. Todd*, 112 Ill. 379; *Columbia Del. Bridge v. Geisse*, 34 N. J. L. 268. ¹¹ *Delaware, L. & W. R. v. Burson*, 61 Pa. 369; *American Cannel Coal Co. v. Huntingdon, T. & C. R.*, 130 Ind. 98; *Flint & P. M. R. v. Detroit & B. C. R.*, 64 Mich. 350.

⁶ *Pittsburgh & S. R. v. Hall*, 25 Pa.

tion without knowing the amounts charged to each.¹ Hence, a gross verdict for severance and level crossing was set aside, because it was impossible for the court of appeal to determine the adequacy of compensation for each injury.²

It is sometimes required, and always proper, that, where benefits are to be taken into account, the report shall show the value of the benefits, and not merely the net compensation.³ But it has been held that benefits need not be assessed separately unless the statute so commands.⁴ It has been held that a report of "no damage" is good, as it will be presumed that the commissioners have found that the benefits offset the damages.⁵

As proceedings to condemn are based upon a right, they are not appropriate for the settlement of claims arising from a wrong. Hence, it is improper for the tribunal to award damages for a trespass committed by the corporation,⁶ or for injuries due to improper construction or management.⁷ But if such an award has been paid it should not be disturbed.⁸ Where the proper items in an award are distinguishable from the improper the former should be sustained. Thus, where compensation is given for an appropriation of land, and for damage caused by negligence, the latter should be struck out.⁹

§ 353. *Action upon the Report.* — Where the report of the tribunal is made conclusive,¹⁰ it is, of course, complete in itself, and marks the close of the proceedings. But it is frequently enacted that the conclusions of the tribunal shall be subjected to further action before their standing is fixed. This action is usually of a confirmatory nature. It is often required that the report shall be formally approved by a court. Indeed, it has

¹ *Wead v. St. Johnsbury & L. C. R.*, 64 Vt. 52.

² *Caledonian R. v. Ogilvy*, 2 Macq. H. L. C. 229.

³ *Ohio & P. R. v. Wallace*, 14 Pa. 245; *Pueblo & A. V. R. v. Rudd*, 5 Col. 270. See also *Philadelphia & E. R. v. Cake*, 95 Pa. 139.

⁴ *Beekman v. Jackson County*, 18 Or. 283.

⁵ *Rassier v. Grimmer*, 130 Ind. 219.

⁶ *Doud v. Mason City & F. D. R.*, 76 Iowa, 438; *Canton, A. & N. R. v.*

French, 68 Miss. 22; *Blodgett v. Utica & B. R. R.*, 64 Barb. 580; *Thompson's Case*, 43 Hun, 416; *Chicago & A. R. v. Goodwin*, 111 Ill. 273.

⁷ *Neilson v. Chicago, M. & N. W. R.*, 58 Wis. 516; *Badger v. Boston*, 130 Mass. 170; *Chicago & I. R. v. Hunter*, 128 Ind. 213.

⁸ *Leber v. Minneapolis & N. R.*, 29 Minn. 256.

⁹ *People v. Schuyler*, 69 N. Y. 242.

¹⁰ See § 356.

been held that where commissioners are appointed by a court, a duty to submit their report to the court for confirmation will be implied, in case the statute does not expressly declare it.¹ Confirmation of another sort is required where the report of a tribunal, acting on behalf of a political corporation, is to be confirmed or accepted by the corporation. This requirement does not contemplate, necessarily, a legal review of the proceedings, but rather a scrutiny in the interest of public expediency, so that the corporation may guard against extravagance and inutility.² Where the United States contemplate condemnation the President may be authorized to scrutinize the valuation of the property needed, not for the purpose of determining its correctness, but simply to decide whether the public necessity will justify the expenditure of the amount. Such action is not judicial, but executive.³

Amendment.

§ 354. Where condemnation proceedings are quashed simply because of their irregularity, the execution of a public work is retarded, and its cost is increased by the cost of new proceedings, while the owner is not, as a rule, really benefited, as his property is still to be condemned. Therefore, where the defect is a mere irregularity the power to cure it by seasonable amendment should be liberally exercised. Amendment should be encouraged whenever the defect can be remedied without depriving the owner of any substantial right, or throwing the proceedings into confusion. The petition may be amended not only in formal matters, but to rectify substantial errors and omissions.⁴ Thus, the petition may be amended by adding necessary parties,⁵

¹ *Hingham, etc. Turnpike Co. v. Norfolk County*, 6 Allen, 353; *Wyman v. Eastern R.*, 128 Mass. 346. See also *Luxton v. North River Bridge*, 147 U. S. 337.

² See *Elkhart v. Simonton*, 71 Ind. 7.

³ *Shoemaker v. United States*, 147 U. S. 282.

⁴ *Southwestern Land Co. v. Ditch Co.*, 18 Col. 489; *Contra Costa R. v. Moss*, 23 Cal. 324; *Grand Junction R. v. County Comm.*, 14 Gray, 553; *Eslich v. Mason City & F. D. R.*, 75 Iowa, 443; *Pennsylvania R. v. Porter*, 29 Pa. 165; *Boyd v. Negley*, 40 Pa. 377; *Pennsylvania & N. Y. R. v. Bunnell*, 81 Pa. 414; *Young v. Laconia*, 59 N. H. 534; *Suburban Rap. Trans. R.*, 38 Hun, 553; *Rochester H. & L. R.*, 45 Hun, 126; *Russell v. Turner*, 62 Me. 496. See *Perry v. Sherborn*, 11 Cush. 388; *Midland R. v. Smith*, 109 Ind. 488.

⁵ *Bowman v. Venice & C. R.*, 102

altering the location of the work,¹ reducing the quantity of land to be condemned,² altering the description of the property in question,³ and alleging that the work will be of public utility, and thereby taking it out of the category of private uses.⁴ Amendment has been permitted to the end that the plan of construction be so modified that the work will cause less injury to property.⁵ Thus, it appears that a city, condemning land for a sewer, may amend its petition to the effect that the manholes shall be so constructed as to prevent the escape of sewer gas.⁶ A railroad company may amend their petition by altering their plan of construction so as to include fencing, and an underground crossing.⁷ But an amendment should not be allowed which will confuse or radically alter the proceedings. Thus, where the petition of a railroad company for the condemnation of riparian land contained an agreement to construct a draw-bridge, so that the owner might still have access to the water, the agreement cannot afterwards be struck out.⁸ A corporation cannot have its petition so amended as to bring the proceedings within the purview of another statute than the one under which they were commenced.⁹

Until the tribunal has filed the report it may be amended.¹⁰ But when the tribunal has filed the report its powers are exhausted, as a rule, and it cannot revise or amend unless authorized by statute.¹¹ A court of review cannot, in the absence of statutory authority, correct errors in the report, but must quash or recommit it. But a clerical error in the report may be corrected by the court.¹²

Ill. 459. See *Chicago & W. R. v. Gates*, 120 Ill. 86; *Wood v. Comm. of Bridges*, 122 Mass. 394; *Littlefield v. Boston & M. R.*, 65 Me. 248.

¹ *Windham v. Litchfield*, 22 Conn. 226.

² See *Prospect Park & C. I. R.*, 67 N. Y. 371.

³ *Hunt v. New York, C. & S. L. R.*, 99 Ind. 593.

⁴ *Coolman v. Fleming*, 82 Ind. 117.

⁵ *Chicago & I. R. v. Hunter*, 128 Ind. 213.

⁶ *Pasadena v. Stimson*, 91 Cal. 238.

⁷ *Chicago & G. S. R. v. Jones*, 103 Ind. 386.

⁸ *New York, W. S. & B. R.*, 89 N. Y. 453.

⁹ *Peoria, P. & J. R. v. Black*, 58 Ill. 33.

¹⁰ *Springbrook Road*, 64 Pa. 451. See also *Long v. Talley*, 91 Mo. 305.

¹¹ *State v. Longstreet*, 38 N. J. L. 312; *People v. Mott*, 60 N. Y. 649; *Northern R. v. Concord & C. R.*, 27 N. H. 183. See *Stokes v. Parker*, 53 N. J. L. 183.

¹² *Anderson v. Township Board*, 75 Mo. 57.

REVIEW OF PROCEEDINGS.

§ 355. When and how may proceedings to condemn be reviewed by a court upon motion of a party interested? At the outset of this investigation it should be noted that, as a rule, the reviewing power of the courts cannot be invoked until the proceedings are completed.¹ But there may be exceptions to this rule. Thus, where the jurisdiction of the tribunal in the premises is doubtful, it may be proper to decide the question at once upon *certiorari*.²

A review may be requested for one of two reasons. The proceedings themselves may be objected to in respect to jurisdiction, or form. The objection may go to the conclusions of the tribunal in respect to the amount of compensation, or the necessity of the undertaking. An objection of the first kind is necessarily a ground for review. Otherwise, the cardinal rule that proceedings to condemn must conform to a constitutional statute would be often practically worthless. As a large proportion of the decisions cited in this book review proceedings upon allegations of jurisdictional or formal defects, it is unnecessary to specify here the causes for review. Where errors in procedure could have been taken advantage of during the course of the proceedings a court of review will not take cognizance of them.³

§ 356. A review of the decision of the tribunal on its merits is, in the absence of constitutional provision, a matter of legislative grace, not of constitutional right. An appeal is not an essential feature of that "due process of law" without which one cannot be deprived of his property.⁴ The privilege of appeal

¹ *Wheeling & B. Bridge v. Wheeling Bridge*, 138 U. S. 287; *Kiskiminitas Road*, 32 Pa. 9; *State v. Englemann*, 106 Mo. 628; *Pack v. Chesapeake & O. R.*, 5 W. Va. 118; *California South. R. v. South. Pacific R.*, 67 Cal. 59. See also *Williams v. Hartford & N. H. R.*, 13 Conn. 111; *Roosa v. Henderson County*, 59 Ill. 446.

² See *Luxton v. North River Bridge*, 147 U. S. 337.

³ *Shepherd v. Baltimore & O. R.*, 130 U. S. 426; *Field v. Vermont & M. R.*, 4 Cush. 150. See § 390.

⁴ *State v. Stewart*, 74 Wis. 620; *Prospect Park & C. I. R.*, 85 N. Y. 489. See also *New York & B. Bridge v. Clark*, 137 N. Y. 95; *Pollard v. Moore*, 51 N. H. 188; *Koenig v. County of Winona*, 10 Minn. 238.

in its broadest form enables the parties to appeal successively up to the court of last resort. Agreeably to the principle just noted, the legislature may wholly deny the privilege by making the judgment of the tribunal conclusive, or qualify it by permitting a final appeal to a court of inferior jurisdiction.¹ Although an award, made conclusive at any stage of the proceedings, cannot be thereafter reviewed on its merits, its finality is conditioned on its conformity to the general principles of law, and the requirements of the particular statute.² Hence, the court may inquire whether compensation was assessed in a case where the tribunal was authorized to act.³ So the award may be set aside on account of the irregular conduct of the tribunal,⁴ or for error in the basis of assessment,⁵ such as estimation of urban land as farm land.⁶

§ 357. Where the award is not conclusive it stands on much the same plane as the finding of a common-law jury, a conclusion reached by a competent and impartial tribunal, and not to be lightly disturbed.⁷ The reluctance of the courts to disturb an award is well illustrated in a recent decision of the House of Lords. The opinions of experts, as to whether the land condemned contained valuable minerals, were conflicting. The jury preferred the affirmative opinion, and valued the property as mineral land. The House of Lords refused to set aside the award, deeming it unjust "to impose upon a person whose land has been taken from him against his will, the burden of proving by costly experiments the mineral contents of his land as a condition precedent to obtaining compensation, merely because the opinion of experts may be in conflict on the subject, or because in the opinion of a court of appeal the weight of scien-

¹ *Comm. of Central Park*, 50 N. Y. 493; *Board of Street Opening*, 111 N. Y. Pr. 56.

² *Houghton's Appeal*, 42 Cal. 35.

³ *Garrison v. New York*, 21 Wall. 196; *Riker v. New York*, 3 Daly, 174.

⁴ *Clark v. Saybrook*, 21 Conn. 313.

⁵ *Matter of New York*, 49 N. Y. 150; *People v. Canal Board*, 7 Lana. 220.

⁶ See *New York, L. & W. R.*, 102 N. Y. 704.

⁶ *Central Park Extension*, 16 Abb.

⁷ *Shoemaker v. United States*, 147 U. S. 282; *Port Huron & N. W. R. v. Callanan*, 61 Mich. 22; *Wilmington & W. R. v. Smith*, 99 N. C. 131; *Postal Tel. Co. v. Louisville, N. O. & T. R.*, 43 La. An. 522; *McReynolds v. Burlington & O. R. R.*, 106 Ill. 152; *Railway Co. v. Combs*, 51 Ark. 324.

tific evidence is adverse to the claim."¹ But the award may be set aside because made arbitrarily,² or based on erroneous principles of valuation.³ False representations made to the tribunal may afford ground for setting aside the award,⁴ but it should be shown that the representations have been acted upon.⁵ The award should not be sustained if it is clearly excessive,⁶ or inadequate.⁷

§ 358. Where the constitution or statute declares that compensation shall be assessed by a particular tribunal a court of review cannot of course alter the award. It can only approve it, or order a reassessment.⁸ But, in the absence of constitutional restriction, a court may be authorized to correct errors in the assessment. A statute enabled the owner of land taken by a city to obtain relief, in case of dissatisfaction with the award, by appealing to a court, who should thereupon reassess the compensation. It was held that the court was invested with full power of reassessment, and could as well reduce the award as increase it.⁹

§ 359. What effect does a judicial determination to review the proceedings have upon the progress of the undertaking? If the objection goes to the legality of the proceedings the work cannot, of course, be prosecuted until it is overruled.

In case the award of compensation is appealed from, and compensation precedent is not required by the constitution, there is

¹ *Brown v. Comm. for Railways*, 15 App. Cas. 240.

² *Kansas City, C. & S. R. v. Story*, 96 Mo. 611; *Peoria & R. I. R. v. Birkett*, 62 Ill. 332; *Barbadoes St.*, 8 Phila. 498.

³ *Swinney v. Fort Wayne & M. & C. R.*, 59 Ind. 205; *State v. Pierson*, 37 N. J. L. 363; *Crater v. Fritts*, 44 N. J. L. 374; *Port Huron & S. W. R. v. Voorheis*, 50 Mich. 506; *Union Depot Co. v. Backus*, 92 Mich. 33.

⁴ See *Butman v. Vermont Cent. R.*, 27 Vt. 500.

⁵ *Port Huron & N. W. R. v. Callanan*, 61 Mich. 22.

⁶ *New Jersey R. v. Suydam*, 17 N. J. L. 25; *Carpenter v. Easton & A. R.*, 26

N. J. Eq. 168; *Mnt. Union Tel. Co. v. Katkamp*, 103 Ill. 420; *Atchison, T. & S. F. R. v. Schneider*, 127 Ill. 144; *Joy v. Water Co.*, 85 Me. 109; *Merriam v. Meriden*, 43 Conn. 173; *Kansas City, S. & C. R. v. Campbell*, 62 Mo. 585, *Dudley v. Minnesota & N. W. R.*, 77 Iowa, 408.

⁷ *Grand Rapids v. Perkins*, 78 Mich. 93; *Louisville City R. v. Cent. Pass. R.*, 87 Ky. 223. See *Clarke v. Chicago, K. & N. R.*, 23 Neb. 613.

⁸ *Rochester Water Works v. Wood*, 60 Barb. 137; *Mississippi Riv. Bridge v. Ring*, 58 Mo. 491. See also *New Jersey R. v. Suydam*, 17 N. J. L. 25.

⁹ *Hall v. Meriden*, 48 Conn. 416.

no objection to authorizing the corporation to enter pending appeal, upon tender of the sum first assessed.¹ Where a right to appeal is not given by the constitution it has been held that a constitutional requirement of previous compensation or security is not transgressed in a statute which permits entry after tender of the sum first assessed, for it is said that if the legislature gives an appeal, it may also prescribe the terms upon which it may be taken.² Even where an appeal is guaranteed by the constitution it has been held that the legislature may authorize a corporation to enter pending appeal, upon depositing the assessed compensation;³ although the corporation cannot take this course in the absence of express authority.⁴ On the other hand, it has been decided that a tender of the award after the owner has appealed will not justify entry,⁵ nor will entry be permitted upon a tender made before a reasonable time has elapsed without appeal.⁶

Methods of Review.

§ 360. The most common methods of reviewing proceedings to condemn are appeal and *certiorari*. The force of these remedies depends so largely upon local custom or statute that only their most marked characteristics are of general interest. Although the right to appeal is, in the absence of constitutional declaration, purely statutory,⁷ it has been inferred from long established custom in similar cases.⁸ When the statute allows an appeal, but does not prescribe the procedure, the court will

¹ New York Cent. & H. R. R., 60 662; *Eidemiller v. Wyandotte City*, 2 N. Y. 116; *Chicago, S. F. & C. R. R. v. Dill*, 376.

Phelps, 125 Ill. 482.

² *Cooper v. Anniston & A. R.*, 85

Ala. 106.

³ *Oliver v. Union Point & W. P. R.*, 83 Ga. 257. See also *Levering v. Philadelphia, G. & N. R.*, 8 W. & S. 459

⁴ *Mobile & G. R. v. Alabama Mid.*

Central Branch, etc. R. v. Atchison, T. & S. F. R., 28 Kan. 453; *Rothan v. St. Louis, O. H. & C. R.*, 113 Mo. 132; *Langdon*, 22 Minn. 565.

Consumers Gas Co. v. Harless, 131 Ind. 446; *St. Louis & S. F. R. v. Brick Co.*, 85 Mo. 307; *North. Pacific R. v. St. Paul, M. & M. R.*, 3 Fed. Rep. 702.

⁵ *Waite v. Port Reading R.*, 48 N. J. Eq. 346. See *Trustees of Iowa College v. Davenport*, 7 Iowa, 213.

⁶ See § 356.

⁷ *Pemigewasset Bridge v. New Hampton*, 47 N. H. 151.

enforce, as far as possible, the existing rules for the prosecution of appeals.¹

§ 361. *Certiorari*. — The common-law writ of *certiorari* issues from a superior court to the judges or officers of an inferior court, commanding them to return the records of a case depending before them in order that the superior court may do justice in the premises.² The present practice warrants at least this substantial amendment to the foregoing definition. The record need not be that of a court. It is sufficient that it is the record of a body acting in a judicial capacity.

Certiorari is often issued in condemnation cases. The common-law writ will not be granted as of right. The petition for it is addressed to the discretion of the court.³ The petition will not be granted, as a rule, where another remedy is open.⁴ Although it is generally held that the writ should be issued only to inquire into the acts of a body exercising judicial functions there is not a complete agreement as to the definition of these functions. Thus, it has been held in Massachusetts that city authorities in laying out a street act judicially,⁵ while in New York a similar action is called ministerial.⁶ The propriety of the writ is generally recognized in cases where the record does not plainly show that the tribunal has jurisdiction.⁷ But *certiorari* is not the proper mode of reviewing proceedings to condemn on their merits, that is to say, on the adequacy of the award,⁸ and it has been refused when sought for the purpose of reviewing disputed questions of fact or law.⁹ In New Jersey the writ of *certiorari* is given a wider application than else-

¹ *Warne v. Baker*, 24 Ill. 351. See also *Hamilton v. Fort Wayne*, 73 Ind. 1; *Peters v. Hastings & D. R.*, 19 Minn. 260. *California Pacific R. v. Cent. Pacific R.*, 47 Cal. 528; *Dunlap v. Toledo, A. A. & Z. R.*, 46 Mich. 190. See also *West. Union R. v. Dickson*, 30 Wis. 389.

² Bacon's Abridgement, *Certiorari*.

³ *Hyslop v. Finch*, 99 Ill. 171; *Landaff's Petition*, 34 N. H. 163; *Hancock v. Boston*, 1 Met. 122. ⁴ *Mt. Morris Square*, 2 Hill, 14; *Germantown Ave.*, 99 Pa. 479; *Flint & P. M. R. v. Norton*, 64 Mich. 248; *Spray v. Thompson*, 9 Iowa, 40. See also *State v. Pierson*, 37 N. J. L. 363; *People v. Betts*, 55 N. Y. 600.

⁵ *People v. Betts*, 55 N. Y. 600; *Grand Rapids, L. & D. R. v. Weiden*, 69 Mich. 572. ⁶ *Parks v. Boston*, 8 Pick. 218. ⁷ *McAllilley v. Horton*, 75 Ala. 491; *Hamilton v. Harwood*, 113 Ill. 154.

⁸ *Parks v. Boston*, 8 Pick. 218.

⁹ *Mt. Morris Square*, 2 Hill, 14.

⁷ *Comm. v. Hearne*, 59 Ala. 371;

where.¹ The courts of this State have, upon *certiorari*, reviewed legislative and ministerial acts, as well as judicial ones,² and the constitutionality of the statute under which the proceedings are instituted;³ and have set aside proceedings because compensation has not been awarded to a party entitled,⁴ and because the statute does not authorize the taking of the property in question.⁵

STATUTORY PROCEEDINGS AT THE INSTANCE OF THE OWNER.

§ 362. It is quite often prescribed that compensation shall be obtained by an action brought by the owner. In this case the expropriators may have the benefit of public powers without the burden, unless it be cast upon them by the owner. The propriety of this practice has been already discussed.⁶ In some cases the legislature prescribes regular proceedings to condemn, and gives a right of action to the owner as well, so that he may not be prejudiced by neglect to take proceedings.⁷ But in such case the owner does not waive his right to compensation by failing to take the initiative.⁸ The form of action is commonly a petition for the assessment of compensation. But, whatever form be prescribed, the action is not given to redress a wrong, but to obtain compensation for an authorized interference with private property. Therefore, whatever may be the effect of a recovery in a common law action of trespass,⁹ an action prescribed by statute is usually intended to effect a final adjustment of the rights and liabilities of the parties.¹⁰

§ 363. **Statutory Remedy exclusive.**— There has been some controversy over the question whether the statutory action in a

¹ *Morris & E. R. v. Hudson Tunnel Co.*, 38 N. J. L. 548. See also *Luxton v. North River Bridge*, 147 U. S. 337.

² *Camden v. Mulford*, 26 N. J. L. 49.

³ *Doughty v. Somerville & E. R.*, 21 N. J. L. 442.

⁴ *State v. Hulick*, 33 N. J. L. 307.

⁵ *State v. Montclair R.*, 35 N. J. L. 328.

⁶ See § 231.

⁷ *Lehigh Val. R. v. McFarlan*, 43 N. J. L. 605. See also *Mulholland v. Des Moines West. R.*, 60 Iowa, 740; *Ash v. Cummings*, 50 N. H. 591.

⁸ *Beck v. Louisville, N. O. & T. R.*, 65 Miss. 172; *Nichols v. Somerset & K. R.*, 43 Me. 356. See *Calking v. Baldwin*, 4 Wend. 667.

⁹ See § 309.

¹⁰ *Lehigh Val. R. v. McFarlan*, 43 N. J. L. 605; *Delaware, L. & W. R. v. Burson*, 61 Pa. 369.

given case is exclusive, or merely cumulative. Lord Coke has written: "If a statute gives a remedy in the affirmative (without a negative, express or implied) for a matter which was actionable at the common law, the party may sue at the common law as well as upon the statute, for this does not take away the common-law remedy."¹ In *Crittenden v. Wilson*,² an act, authorizing the erection of a dam, provided a summary method for the redress of injuries by flooding. It was held that, according to the rule laid down by Lord Coke, the common-law remedy was not taken away. In *Calking v. Baldwin*,³ *Crittenden v. Wilson* was distinguished on the ground that, the act construed therein being a private act, a common-law remedy existed, while in the case at bar the act was a public one, and hence could be pleaded in bar of a common-law action. What appears to be the pertinent rule has been concisely stated in a well-known treatise on statute law: "If an affirmative statute which is introductive of a new law direct a thing to be done in a certain manner, that thing shall not, even if there are no negative words, be done in any other manner."⁴ Now whenever the legislature authorizes the exercise of the eminent domain it enacts a law which, though not always new in the sense of being novel, is new as a distinct manifestation of state power unrelated to the common law. As such a law is intended to further public interests, the legislature may properly prescribe a single comprehensive method for the adjustment of private rights necessarily impaired by its execution, so that those maintaining public works may not be subjected to vexatious suits. It is commonly held, therefore, that where the statute provides a form of action for the settlement of private claims that action is the only one available,⁵ although in some cases it is found that the legislature permits an election between the common-law and statutory actions.⁶

¹ 2 Inst. 200.

² 5 Cowen, 165.

³ 4 Wend. 667.

⁴ Dwarries on Statutes, 641.

⁵ *Troy v. Cheshire R.*, 23 N. H. 83; *Stowell v. Flagg*, 11 Mass. 364; *Boston Belting Co. v. Boston*, 149 Mass. 44; *Smith v. Tripp*, 14 R. I. 112; *Mason v. Kennebec & P. R.*, 31 Me. 215;

Heiser v. New York, 104 N. Y. 68;

Brown v. Beatty, 34 Miss. 227; *Wag-*

ner v. Salzburg Township, 132 Pa. 636;

Phillips v. St. Clair, etc. R., 153 Pa.

230; *Holloway v. University R.*, 85

N. C. 452; *Kaukauna Water Power*

Co. v. Green Bay & M. Canal, 142 U. S.

254.

⁶ *Parker v. East Tennessee, V. & G.*

§ 364. A statutory action, to be exclusive, must be adequate.¹ The action is exclusive only in such cases as are clearly within the purview of the statute.² Thus, if damage result from an unauthorized mode of construction the aggrieved party may disregard the statutory action and bring trespass.³ As the remedy is provided for the settlement of claims consequent on a rightful act, it follows that where public powers have been usurped or abused the ordinary remedies may be pursued. Therefore, unless expropriators comply with the enabling part of the statute they cannot insist that the owner shall comply with the remedial provisions.⁴ This proposition is ably sustained in *Blanchard v. Kansas City*.⁵ The governing constitution declared that compensation should be paid in advance for property taken or damaged for public use, and pointed out the method by which it should be assessed. The corporation disregarded these declarations, and then demurred to a common-law action brought by one whose property was damaged. Justice Miller overruled the demurrer on the broad ground that where a method of condemnation is prescribed, and neither party attempts to put it in force, the constitutional obligation to indemnify still exists, and may be enforced in a common-law action.

ARBITRATION.

§ 365. The Lands Clauses Act provides that where unsatisfactory compensation claimed or offered amounts to £50 the claimant may forestall the appeal of the promoters to a jury by demanding arbitration, the procedure in which is carefully designated.⁶ In this country the assessment of compensation

R., 13 Lea, 669; *Doe v. Georgia R.*, etc. Co., 1 Ga. 524; *Birge v. Chicago, M. & S. P. R.*, 65 Iowa, 440.

¹ *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394. See also *Ash v. Cummings*, 50 N. H. 591.

² *Cogswell v. Essex Mill Corp.*, 6 Pick. 94; *Mayo v. Springfield*, 136 Mass. 10; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; *St. Peter v. Denison*, 58 N. Y. 416.

³ *Estabrooks v. Peterborough & S. R.*, 12 Cush. 224.

⁴ *Townsend's Case*, 39 N. Y. 171; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127; *Bellingham Bay R. v. Loose*, 2 Wash. 500; *Strickler v. Midland R.*, 125 Ind. 412; *Republican Val. R. v. Fink*, 18 Neb. 82; *Healey v. New Haven*, 49 Conn. 394. See *Bartlett v. Bristol*, 24 Atl 906 (N. H. 1890); *Fehr v. Schuylkill Nav. Co.*, 69 Pa. 161.

⁵ 16 Fed. Rep. 444.

⁶ Sects. 23-38.

by arbitration is comparatively uncommon. Where a contractor, engaged in acquiring a railroad right of way, agrees with a landowner to submit the matter of compensation to arbitration, and the agreement is carried out, the company have a sufficient interest in the agreement to assert it in bar of an action against them for compensation.¹ If a corporation has entered upon property, after the making of an award by arbitrators, the entry is to be treated as a ratification, and it is too late to object that improper items of compensation were considered,² or that four arbitrators acted, instead of three as prescribed by statute.³ A railroad corporation, which has been in the habit of permitting its officers to refer the question of compensation to arbitration, cannot thereafter refuse to pay an award of arbitrators on the ground that its officers had no authority to agree to an arbitration.⁴ An arbitration committee has been allowed to pass upon the title of a claimant for compensation, although not expressly authorized.⁵ It has been held that where the statute prescribes a method of assessment where a political corporation is the actor the parties cannot resort to arbitration.⁶ A claim under a flowage act cannot be arbitrated under a statute providing for the arbitration of controversies which might be the subjects of personal actions at law or suits in equity.⁷ Where a corporation is willing to buy property which the owner is willing to sell, but they cannot agree upon the price, there is not a matter which can be arbitrated under a statute providing for the arbitration of controversies which may be subjects of civil actions.⁸ A statute which provides for arbitration as the means of ascertaining compensation, but does not afford the means of enforcing payment of the award, is unconstitutional.⁹

¹ *Terre Haute & L. R. v. Harris*, 126 Ind. 7.

² *Viele v. Troy & B. R.*, 20 N. Y. 184.

³ *La Crosse & M. R. v. Seeger*, 4 Wis. 268.

⁴ *Wood v. Auburn & R. R.*, 8 N. Y. 160.

⁵ *Thurston v. Portland*, 63 Me. 149.

⁶ *Paret v. Bayonne*, 39 N. J. L. 559;

Eastman v. Stowe, 37 Me. 86.

⁷ *Henderson v. Adams*, 5 Cush. 610.

⁸ *Mahoney v. Spring Val. Water Co.*, 52 Cal. 159.

⁹ *Southwestern R. v. South. & A. Tel. Co.*, 46 Ga. 43.

CHAPTER XII.

REMEDIES.

§ 366. The last chapter was devoted to the procedure by which the rights and obligations incident to the orderly exercise of the eminent domain are enforced. The present chapter deals first with the legal and equitable remedies for wrongful interferences with property under cover of the public interests. Then will be considered the remedies of public agents for the protection of their rights in property condemned, the principle of estoppel as applied to condemnation, and the limitation of actions.

Who may Complain?

§ 367. The abuse of the eminent domain by those to whom it is entrusted may injure the public in whose interest the power was granted. In such a case the state may intervene. Where a diversion of the property condemned to private use is detrimental to the public interest the state may proceed against the offending corporation by *quo warranto*, or information in the nature thereof.¹ But the public cannot complain where a private use of land condemned does not impair the public use. Hence, the erection of a saw-mill on railroad property, by the license of the corporation, is not cause for state action, where a safe and convenient way is left for railroad purposes.²

§ 368. The persons chiefly interested in the exercise of the eminent domain are evidently those whose property is taken, and those who pay for it. The latter have, as a rule, no such interest as will enable them to question directly the exercise of

¹ Nat'l Docks R. v. Central R., 32 N. J. Eq. 755; State v. Railway Co., 40 Ohio St. 504. See also Brown v. Calumet River R., 125 Ill. 600. ² See Grand Trunk R. v. Richardson, 91 U. S. 454.

the power. Where a private corporation seeks to condemn, the raising of the compensation fund is primarily the concern of the stockholders. If the project is beyond the powers of the corporation a stockholder may doubtless restrain its execution. But in so doing he affects the eminent domain incidentally. His cause of action is the violation of his contract. Where the state, or a political corporation, condemns, the burden of making compensation usually falls upon the taxpayers. The orderly exercise of the eminent domain cannot be questioned by those who must contribute as taxpayers to the cost and maintenance of the public work. The condemnation is the act of their accredited agents, and hence their own.¹ If the undertaking is not within the competency of the authorities, or is promoted by unlawful means, the taxpayer may refuse to pay the resulting tax; indeed there may be cases in which he can enjoin the prosecution of the work. In either case, however, there is not a direct attack upon the power to condemn.

§ 369. The persons who have a direct adverse interest in respect to the exercise of public powers are those whose rights of property are affected. It goes without saying that one cannot have a remedy unless he has suffered a wrong. Therefore, one cannot complain on account of an abuse of power unless he can show an interest in the property affected, and an injury to it.² It may be noted here that the maxim *de minimis non curat lex* rarely applies to vested rights in property. No substantial injury, however small, to such property is so trifling as to deprive the owner of any remedy which he might have for a greater injury of the same kind.³

The list of complainants is further limited by the rule that if

¹ *Betts v. New Hartford*, 25 Conn. 280; *Vanderstolph v. Boylan*, 50 Mich. 330. See also *Askew v. Hale County*, 54 Ala. 639.

² *Morgan v. Monmouth Plank Road*, 26 N. J. L. 99; *Pierrepont v. Loveless*, 72 N. Y. 211; *Waterloo Man. Co. v. Shanahan*, 128 N. Y. 345; *Kettle River R. v. Eastern R.*, 41 Minn. 461; *Wellington's Petition*, 16 Pick. 87; *Hingham & Q. Bridge v. County of Norfolk*, 6 Allen, 353. See also *Spring v. Russell*, 7 Me. 273.

³ *Cole v. Drew*, 44 Vt. 49; *Indianapolis, etc. Road Co. v. Belt R.*, 110 Ind. 5; *Seneca Road Co. v. Auburn & R. R.*, 5 Hill, 170; *Adler v. Met. El. R.*, 28 Abb. N. C. 198. See *Dowling v. Pontypool, C. & N. R.*, L. R. 18 Eq. 714; *Trustees, etc. v. Milwaukee & L. W. R.*, 77 Wis. 158.

one suffers an injury in common with the public he cannot bring an action, unless there is a special damage to him over and above the injury to the public.¹ Thus, although the leasing of a public wharf for a private elevator may be unlawful, as a diversion of public property to private use, it cannot be enjoined at the instance of one who is accustomed to use the wharf as one of the public.²

The proposition which supports the rule just mentioned — the state is the sole guardian of public rights, the sole prosecutor of public wrongs — supports also the rule that a forfeiture of corporate franchises will not be decreed at the suit of a private person.³

Who may be Sued ?

§ 370. **Claims against the State.** — All corporations, political or private, and all individuals are of course amenable to the law for any usurpation or abuse of public powers. The obligations of the eminent domain, that property can be taken for public use only, and must be paid for, are as binding where the state is the actor, as where the power is delegated. But it is a familiar rule of public law that a sovereign cannot be impleaded in its own courts against its will.⁴ Owing to the peculiar relation of the States to the Federal Government this rule was found at an early date to afford inadequate protection to the States.⁵ Hence, the adoption of the Eleventh Amendment, which prohibits the impleading of a State in a federal court by citizens of another State, or by citizens or subjects of a foreign state.⁶ The effect of the rule in question is to render the right to compensation against the state a pure abstraction, a claim on the

¹ *Chicago v. Union Building Ass'n*, 102 Ill. 379; *Terre Haute & L. R. v. Bissell*, 108 Ind. 113; *Dodge v. Pennsylvania R.*, 43 N. J. Eq. 351; *Larimer & L. St. Ry. v. Larimer St. Ry.*, 137 Pa. 533; *Adler v. Met. El. R.*, 138 N. Y. 173; *Glaessner v. Anheuser-Busch Brewing Co.*, 100 Mo. 508; *Willard v. Cambridge*, 3 Allen, 574; *Liverpool v. Chorley Waterworks Co.*, 2 De G. M. & G. 852.

² *Illinois, etc. Canal v. St. Louis*, 2 Dill. C. C. 82.

³ *New York Cable Co. v. New York*, 104 N. Y. 1; *Hestonville, M. & F. R. v. Philadelphia*, 89 Pa. 210; *White v. South Shore R.*, 6 Cush. 412; *Proprietors of Locks, etc. v. Nashua & L. R.*, 104 Mass. 1; *Hamilton v. Annapolis & E. R. R.*, 1 Md. Ch. 107.

⁴ Bluntschli, *Theory of the State* (Eng. ed.), 478.

⁵ See *Chisholm v. Georgia*, 2 Dall. 419.

⁶ *New Hampshire v. Louisiana*, 108 U. S. 436.

honor of the government which can be satisfied only through the grace of the legislature. Thus far the strict rule of public law, which declares that the public interest in the dignity of the state, and in the integrity of its resources, does not permit the enforcement of private claims. We shall see presently how far the state voluntarily assumes the position of a defendant, and how far the ingenuity of courts has afforded redress by permitting the impleading of public servants.

§ 371. The injustice of relegating all claimants to the difficulties and uncertainties of an appeal to the legislature has led to the adoption of general laws under which certain sorts of claims may be adjudicated. The United States have instituted a court, in which they may be sued on account of certain claims.¹ Should the claimant prevail he shall be paid out of such funds as may have been appropriated by Congress to meet such demands. Congress did not, at first, definitely provide for the adjudication of claims founded on the eminent domain, and in *Langford v. United States*,² Justice Miller, while not denying that the United States might be liable on an implied obligation to pay compensation for property condemned for public use, said, "It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation." But the Supreme Court have decided in a late case that where the United States take property for public use, without claim of title, they are liable for compensation on an implied contract, which can be sued upon in the Court of Claims.³ The jurisdiction of the Court of Claims in respect to the obligations of the eminent domain is now defined by the Tucker Act,⁴ by which the government permits itself to be sued upon "all claims founded upon the Constitution of the United States."⁵ But where the United States wrongfully claim title to land, and thereupon assert dominion over it to the injury of the rightful owner, he cannot sue for compensation. The act of the government is tortious, and therefore not within the purview

¹ See Richardson's History of the Court of Claims.

² 101 U. S. 341.

³ *United States v. Gt. Falls Man. Co.*,
112 U. S. 645.

⁴ 24 Stat. L. 505.

⁵ Consult *Stovall v. United States*,
26 Ct. Cl. 226.

of the Court of Claims statutes.¹ It has been said that the petition of right which, in England, is the prescribed form for claiming redress from the state has no place in American jurisprudence, as it is addressed to a personal sovereign.² The enactment of a law, whereby the state permits suit to be brought against it by persons asserting an injury to property by reason of a particular exercise of public powers, by no means admits the liability of the state, but leaves it to be proved in the action.³ The sign of the state's intention to honor a pecuniary claim against it is an appropriation of funds by the legislature. If the appropriation is made the custodian of the funds may be compelled to satisfy the claim.⁴ It is to be noted that interest on claims against the state cannot be recovered, unless the state expresses its willingness to pay it.⁵

§ 372. There are cases in which a distinction is drawn between the state and its servants, the effect of which is to expose the latter to private suits. So far as this distinction is predicated upon the wilful act of a public servant, it is clear and well-settled. In such case the government is in nowise compromised.⁶ But the advanced position has been taken that certain invasions of private property, wrongfully ordered by the state, may be prevented by enjoining the immediate actors, or redressed by compelling restitution in proceedings directed against the officials in possession. Thus, it has been said that if agents of the War Department, acting under the authority of Congress, should attempt to take private property for public use without compensation they could be enjoined.⁷ A notable case is *United States v. Lee* (*Kaufman v. Lee*).⁸ The estate of Arlington, owned by the wife of General Lee, was sold, shortly after the close of the Civil War, for non-payment of taxes. It was bought by the United States, and used as a national cemetery and military station under the immediate charge of Kauf-

¹ *Langford v. United States*, 101 136 U. S. 211; *Gosman's Case*, 17 Ch. U. S. 341; *Hill v. United States*, 149 D. 771.

U. S. 593. ⁵ See *Gibbons v. United States*, 8

² *United States v. Lee*, 106 U. S. 196. Wall. 269; *Langford v. United States*,

³ *Green v. State*, 73 Cal. 29. 101 U. S. 341.

⁴ *Carr v. State*, 127 Ind. 204.

⁷ *Avery v. Fox*, 1 Abb. C. C. 246.

⁶ *United States v. North Carolina*, ⁸ 106 U. S. 196.

man, an army officer. It was not pretended that the tax sale passed the title, for a proper tender of the taxes on behalf of the owner had been refused. Ejectment was brought in a Virginia court against Kaufman as the occupant. Upon the removal of the cause to a federal court the United States, by their attorney-general, filed a paper moving that the suit be dismissed for want of jurisdiction, and stating that the government appeared only for the purpose of the motion. The Supreme Court, standing five to four, gave judgment for the plaintiff upon the broad ground that the defendant could not rely on the orders of the government, for such orders, being an abuse of power, had no legal existence, and that, therefore, the defendant was in no better position in the matter of possession than one who trespassed on his own account. The court relied on several decisions,¹ and especially on *Osborn v. Bank of the United States*; ² but it seems, however, that the minority were justified in treating the case at bar as one of novel impression, for the factors of a definite possession by the government, and a formal denial of jurisdiction were not present in the cases cited. The principle of the *United States v. Lee* was affirmed in *Poindexter v. Greenhow*,³ which was an action of detinue for the return of chattels distrained for non-payment of taxes. The defendant, a public officer, pleaded the orders of the State of Virginia. It was held that, as the statute under which the officer acted was void, the suit was maintainable. The doctrine of *Lee's Case* has been approved in other cases.⁴

REMEDIES OF THE PROPERTY OWNER.

§ 373. The appropriate remedy for one who is aggrieved by the wrongful assumption or abuse of the eminent domain will be found, usually, among the ordinary common-law or equitable actions. Sometimes, however, the circumstances are such as to warrant recourse to extraordinary means of redress. These will be considered first.

¹ See *Brown v. Huger*, 21 How. 305; *Grisar v. McDowell*, 6 Wall. 363.

² 9 Wheat. 738.

³ 114 U. S. 270.

⁴ *San Francisco Savings Union v. Irwin*, 28 Fed. Rep. 708; *Jones v. United States*, 35 Fed. Rep. 561. See *Stanley v. Schwalby*, 147 U. S. 508.

§ 374. The primitive right of abatement, which enables one to take the law into his own hands and remove a nuisance, is sometimes exercisable where a public agent creates, without right or color of right, a nuisance upon one's land.¹ But the landowner is rarely in a position which will justify the extreme course of abatement. Where one who has acquiesced in the use of his land for public purposes is injured through the failure of the corporation to pay compensation, he cannot retaliate by destroying the works, or impairing their utility, but must seek redress in the courts.² Where land is condemned for a road, and the owner fails to avail himself of the statutory action within the time limited, he has no right to obstruct the road.³ It has been held that one who has the judgment of a State court, giving him the possession of his land wrongfully used by a railroad company, may not obstruct the track so as to delay the mails.⁴ One whose land has been condemned under a road act, which makes sufficient provision for compensation by giving a suitable remedy, cannot obstruct the road because he has not been paid. He must pursue the remedy.⁵ Where public agents peaceably enter upon land, under an authorization apparently sufficient, the owner has no right to re-enter by stealth or force in order to test the regularity of the appropriation.⁶

§ 375. A writ of prohibition has been issued where the authorities attempting to exercise the eminent domain are without jurisdiction.⁷ The writ may be directed to a board of county commissioners who propose to condemn under a statute which fails to secure compensation.⁸ The writ will not be issued to an inferior court, unless it is clearly without jurisdiction over the proceedings to condemn.⁹

¹ See *Thompson v. Allen*, 7 Lans. 459; *Groton v. Haines*, 36 N. H. 388.

² *Kaukauna Water Power Co. v. Green Bay & M. Canal*, 142 U. S. 254.

³ *Dunlap v. Pulley*, 28 Iowa, 469.

⁴ *United States v. De Mott*, 3 Fed. Rep. 478.

⁵ *Chapman v. Gates*, 54 N. Y. 132. See also *State v. Lyle*, 100 N. C. 497.

⁶ *Ligat v. Commonwealth*, 19 Pa. 456.

⁷ *State v. Stackhouse*, 14 S. Car 417; *Day v. Springfield*, 102 Mass.

⁸ *McConiha v. Guthrie*, 21 W. Va. 310.

⁹ *Connecticut River R. v. County Comm.*, 127 Mass. 50.

⁹ *Bishop v. Superior Court*, 87 Cal. 226; *State v. South. R.*, 100 Mo 59;

Harbor Line Comm. v. State, 2 Wash. 530. See also *Hyde Park v. Wiggins*,

157 Mass. 24.

Where the institution of proceedings for the assessment of compensation is unreasonably refused, or delayed, the owner may compel their institution by mandamus.¹ But one whose land has been wrongfully entered upon cannot be compelled to sue for a mandamus requiring the institution of proceedings, but may bring an action.² If the course of proceedings is unreasonably obstructed to the detriment of the owner he may, in certain cases, obtain a mandamus. The writ has been issued to compel the assessment of compensation,³ the depositing of compensation,⁴ the issuing of a warrant for a jury,⁵ and the recording of the verdict of a jury.⁶ Mandamus will lie only to compel the performance of ministerial acts. It will not issue in respect to acts of a judicial nature. Therefore, where public authorities have discretionary power to accept or reject an award of compensation they cannot be forced to accept.⁷ Mandamus has been refused to compel commissioners to rectify a vital mistake where their report has been filed, and they are not authorized to amend it, or make a supplemental one. The proceedings should be set aside.⁸

As the forfeiture of corporate franchises is the concern of the state alone,⁹ a *quo warranto* will not be entertained at the relation of one whose grievance is that compensation has not been paid for the appropriation of his property.¹⁰

§ 376. **Recovery of Compensation.** — It may happen that the compensation assessed is not paid. There are various remedies

¹ *Paret v. Bayonne*, 39 N. J. L. 559; 62 N. Y. 624; *McDowell v. Asheville*, 112 N. C. 747.

Aldrich v. Providence, 12 R. I. 241; *Chicago, B. & Q. R. v. Wilson*, 17 Ill. 123; *West Union R. v. Dickson*, 30

Wis. 389, *Barnstable Savings Bank v. Boston*, 127 Mass. 254. See also *Birmingham & O. J. R. v. The Queen*, 20 L. J. Q. B. 304. See *Mahoney v. Supervisors*, 53 Cal. 383; *Harrington v. St. Paul & S. C. R.*, 17 Minn. 215.

² *Smith v. Chicago, A. & C. R.*, 67 Ill. 191; *Allen v. Wabash, S. L. & P. R.*, 84 Mo. 646. See also *Healey v. New Haven*, 49 Conn. 394.

³ *Budd v. New Jersey R.*, 14 N. J. L. 467; *People v. Green*, 3 Hun, 755; s. c.

⁴ *State v. Grand Island & W. C. R.*, 31 Neb. 209.

⁵ *Carpenter v. County Comm.*, 21 Pick. 258.

⁶ See *Commonwealth v. Justices, etc.*, 5 Mass. 435.

⁷ *Kennebunk Toll Bridge*, 11 Me. 263.

⁸ *State v. Longstreet*, 38 N. J. L. 312.

⁹ See § 369.

¹⁰ *People v. Hillsdale & C. Turnpike*, 2 Johns. 190.

for its recovery, the choice of which is controlled by the statutory, or judicial, rules which obtain within the particular jurisdiction. Payment of compensation is sometimes enforced by mandamus. This writ is especially appropriate when directed to a political corporation, which has condemned property and pledged the taxable property within its jurisdiction as security,¹ for it may command the levying of a sufficient tax.² So, a mandamus will lie against public authorities to compel them to pay over the compensation fund which they have in hand.³ A mandamus, ordering a general tax levy, will not be directed to a municipal corporation where the results of a special assessment to raise the compensation fund have not been determined.⁴ A mandamus will be issued only on the assumption that the proceedings are lawful.⁵

Where the amount of compensation has been fixed by an award it may be recovered in an action of debt, or contract.⁶

§ 377. The action of assumpsit has been sustained in cases where the amount of compensation has been ascertained.⁷ There is some difference of opinion as to the propriety of assumpsit in case of unliquidated compensation. The technical question is whether, from the fact of expropriation, a promise to pay the value of the property taken is implied. The affirmative has been maintained in cases in the United States Court of Claims.⁸ According to other decisions assumpsit is not maintainable for unliquidated compensation. Where an award of compensation

¹ See § 292.

² *Harrington v. County Comm.*, 22 Pick. 263; *Higgins v. Chicago*, 18 Ill. 276; *State v. Keokuk*, 9 Iowa, 438. See *State v. Hug*, 44 Mo. 116.

³ *People v. Brown*, 55 N. Y. 180. See also *Ryan v. Hoffman*, 26 Ohio St. 109; *Myers v. South Bethlehem*, 149 Pa. 85; *Rogers' Case*, 7 Cowen, 526.

⁴ *State v. Superior City*, 81 Wis. 649.

⁵ *People v. Whitney's Point*, 102 N. Y. 81. See also *People v. Schuyler*, 69 N. Y. 242; *People v. Township Board*, 3 Mich. 121.

⁶ *Omaha & N. W. R. v. Menk*, 4 Neb. 21; *Philadelphia v. Dyer*, 41 Pa.

463; *Shaw v. Charlestown*, 3 Allen, 538; *Smart v. Portsmouth & C. R.*, 20 N. H. 233; *Corwith v. Hyde Park*, 14 Ill. App. 635; *Kimball v. Rockland*, 71 Me. 137. See also *McCormack v. Brooklyn*, 108 N. Y. 49; *Sage v. Brooklyn*, 89 N. Y. 189; *Donnelly v. Brooklyn*, 121 N. Y. 9; *Board of Supervisors v. Buffalo*, 63 Hun, 565; *Russell Mills v. County Comm.*, 16 Gray, 347.

⁷ *Bloomington v. Brokaw*, 77 Ill. 194. See also *Jersey City v. Gardner*, 33 N. J. Eq. 622. See *McCullough v. Brooklyn*, 23 Wend. 458.

⁸ *United States v. Great Falls Man. Co.*, 112 U. S. 645.

was set aside it was held that the owner could not sue the city upon an implied contract to pay the value of the land, as this would be opposed to the statute of frauds, and would be, moreover, beyond the contracting power of the city.¹ In *Smith v. Tripp*² the statute provided that the owner should seek compensation within a year. After the expiration of the year assumpsit was brought, and an express promise alleged. The court admitted that such a promise would support the action, but found that the promise must have been general, as there was no agreement as to price; that if made before the end of the year the promise was gratuitous, as it did not appear that the owner had agreed to forego his statutory action; that if made after the year it was without consideration, as the liability of the city had terminated; finally, that the retention of the land did not constitute a moral consideration which would support the promise.

Trespass may be brought against a public agent for any injury to property committed in the unlawful exercise of powers, or the negligent conduct of the undertaking.³ So, a common-law action, usually trespass, may be brought on account of consequential injuries for which the public agent is made liable by constitution or statute,⁴ and for which an exclusive remedy⁵ is not provided.⁶ The rule of the common law obtains that, in the event of actual ouster, trespass will lie for the dispossession only, and not for subsequent damage until possession has been regained.⁷ Pending an action in case on account of an unlawful occupation the parties agreed to a reference. It was urged that this operated as a discontinuance, but the court held that an agreement to refer, not followed by an award, did not discontinue the suit, for the agreement might come to naught, and, in the meantime the owner might lose his remedy by the operation of the statute of limitations.⁸ Where trespass is brought for an alleged abuse of

¹ *Paret v. Bayonne*, 40 N. J. L. 333.

² 14 R. I. 112.

³ *Mulholland v. Des Moines, etc. R.*, 60 Iowa, 740; *Blesch v. Chicago & N. W. R.*, 43 Wis. 183; *Bethlehem Gas, etc. Co. v. Yoder*, 112 Pa. 136.

⁴ See §§ 153-157.

⁵ See §§ 363, 364.

⁶ *Pennsylvania R. v. Duncan*, 111

Pa. 352. See also *Chicago & E. I. R. v. Loeb*, 118 Ill. 203.

⁷ *Murray v. Fitchburg R.*, 130 Mass. 99. See also *Baltimore & O. R. v. Boyd*, 63 Md. 325.

⁸ *Callanan v. Port Huron & N. W. R.*, 61 Mich. 15.

lawful power the constitutionality of the power itself cannot be drawn in question.¹ The most important questions in respect to the action of trespass in connection with our subject—the measure of damages and the effect of recovery—have been already considered.²

§ 378. **Recovery of Possession.**—A landowner may bring ejectment against a corporation in wrongful possession of his property. Ejectment will lie where the occupation is referable to a wrongful entry;³ where there is a failure to perfect title according to the statutory direction;⁴ and where there is a loss of title either through violation of conditions subsequent, as where land is wrongfully diverted to another use,⁵ or through the expiration of an agreement.⁶ In *Austin v. Rutland Railroad Co.*,⁷ the defendants were in possession of a tract of land one undivided moiety of which they had purchased outright, while in the other moiety they held the interest of a life tenant. Upon the death of the tenant the remainderman, whose interest had not been acquired, brought ejectment. As the possession of the company was lawful up to the death of the life tenant, and as a work of public interest had been constructed, Chief Justice Redfield refused to allow ejectment, and referred the plaintiff to the statutory remedy for the recovery of compensation.⁸ Ejectment has been sustained although a verdict will restore but a technical possession, as where the land in question is within the lines of a street.⁹ Ejectment cannot be brought

¹ *Mason v. Kennebec & P. R.*, 31 Me. 215.

² See §§ 307-311.

³ *Carpenter v. Oswego & S. R.*, 24 N. Y. 655; *Bloomfield R. v. Van Slike*, 107 Ind. 480; *Hull v. Chicago, B. & Q. R.*, 21 Neb. 371; *Green v. Tacoma*, 51 Fed. Rep. 622; *Chicago & A. R. v. Smith*, 78 Ill. 96; *Bothe v. Dayton & M. R.*, 37 Ohio St. 147; *Phillips v. Dunkirk, W. & P. R.*, 78 Pa. 177. See also *Railroad Co. v. Robbins*, 35 Ohio St. 531; *Armstrong v. St. Louis*, 69 Mo. 309.

⁴ *Jersey City v. Fitzpatrick*, 36 N. J. L. 120; *Wheeling, P. & B. R. v. Warrell*, 122 Pa. 613.

⁵ *Strong v. Brooklyn*, 68 N. Y. 1.

⁶ *Green v. Missouri Pacific R.*, 82 Mo. 653.

⁷ 45 Vt. 215.

⁸ See *Bradley v. Missouri Pacific R.*, 91 Mo. 493.

⁹ *Wager v. Troy Union R.*, 25 N. Y. 526; *Weyl v. Sonoma Val. R.*, 69 Cal. 202; *Terre Haute & S. R. v. Rodel*, 89 Ind. 128. See *Goodtitle v. Alker*, 1 Burr. 133; *Judge v. New York Cent. & H. R. R.*, 56 Hun, 60; *Edwardsville R. v. Sawyer*, 92 Ill. 377. Compare *Cincinnati v. White*, 6 Pet. 431.

on the score of irregularities in proceedings, where they were not duly objected to.¹

§ 379. A recovery in ejectment against public agents who are invested with necessary powers, but neglect to exercise them properly, may be qualified or restrained, in certain cases, out of regard to the general interest in the maintenance of public undertakings. Thus, although the institution of proceedings to condemn may not be a defence to an action of ejectment,² it has been held that the writ of possession may be stayed, in order that the corporation may have the opportunity to legalize its possession by taking proper proceedings,³ or paying the compensation already assessed.⁴ Further, where one permits a corporation to enter on his land, and make improvements, he cannot bring ejectment on account of non-payment of compensation but should proceed to obtain compensation,⁵ and this though the permission is embodied in a contract.⁶ A like ruling has been made where entry and improvement are made, without the owner's permission, but with his knowledge and sufferance.⁷ But the supremacy of the public convenience over the landowner's common-law right to hold his land until divested by due process of law, or his own agreement within the statute of frauds, has not been approved in some decisions.⁸ In any event, ejectment must not be denied unless the public interest in its denial is clear. Hence, the entry of a railroad company, not followed by construction, does not present a case wherein ejectment should be prevented on the ground of acquiescence, for it need not be assumed that the public interest is involved in the possession of unused property.⁹

¹ *St. Joseph Hydraulic Co. v. Cincinnati, W. & M. R.*, 109 Ind. 172.

² See *Hull v. Chicago, B. & Q. R.*, 21 Neb. 371; *Coburn v. Pacific, L. & M. R.*, 46 Cal. 31.

³ *Richards v. Buffalo, etc. R.*, 137 Pa. 524. See *St. Lawrence & A. R.*, 133 N. Y. 270.

⁴ *Wheeling, P. & B. R. v. Warrell*, 122 Pa. 613; *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97; *Conger v. Burlington & S. R.*, 41 Iowa, 419.

⁵ *Trenton Water Power Co. v. Chambers*, 9 N. J. Eq. 471; *McAulay*

v. West. Vermont R., 33 Vt. 311; *Pro-volt v. Chicago, R. I. & P. R.*, 57 Mo. 256; s. c. 69 Mo. 633.

⁶ *Missouri Pacific R. v. Gano*, 47 Kan. 457.

⁷ *Louisville, N. A. & C. R. v. Beck*, 119 Ind. 124. See also *West. Pennsylvania R. v. Johnston*, 59 Pa. 290.

⁸ *Hooper v. Columbus & W. R.*, 78 Ala. 213. See *Crosby v. Dracut*, 109 Mass. 206; *Walker v. Chicago, R. I. & P. R.*, 57 Mo. 275.

⁹ *Cincinnati, H. & L. R. v. Clifford*, 113 Ind. 460.

Equitable Jurisdiction.

§ 380. The question of granting equitable relief in cases of wrongful appropriation of property to public use has so often engaged the attention of the courts that the jurisdiction in the premises may be said to be fairly well defined.

Proceedings to condemn are of a legal, rather than an equitable, nature. They are supervised by inferior tribunals, whose errors are not cognizable in equity, as a rule, because there is adequate redress at law.¹ Hence, a bill in equity should not be brought to set aside or restrain condemnation proceedings,² nor to restrain entry upon an allegation of the partiality of the tribunal, where an appeal is provided by the statute,³ nor to set aside an award.⁴ An application for an injunction against a municipal corporation, on the ground that proceedings to condemn were void and would cloud the title to the property in question, was refused. The court said that if the proceedings were void they would not cloud the title.⁵ But the jurisdiction of courts of equity in respect to fraud and mistake has enabled them to grant relief in some cases.⁶ Where a tribunal of assessment was so misled by false representations as to assess compensation at one dollar, where it should have given five thousand dollars, relief was granted.⁷

Courts of equity have been successfully invoked to compel the proper apportionment of an award, especially where it is subject to equitable claims.⁸

¹ Brooklyn v. Meserole, 26 Wend. 132; Keokuk & N. W. R. v. Donnell, 77 Iowa, 221; Haff v. Fuller, 45 Ohio St. 495; Pack v. Chesapeake & O. R., 5 W. Va. 118; Cumberland & P. R. v. Pennsylvania R., 57 Md. 267; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57; Buchner v. Chicago, M. & N. R., 56 Wis. 403. See also Doughty v. Somerville & E. R., 7 N. J. Eq. 51; Morris Canal, etc. Co. v. Jersey City, 12 N. J. Eq. 252; Ewing v. St. Louis, 5 Wall. 413; Cherokee Nation v. South. Kansas R., 135 U. S. 641; Bevier v. Dillingham, 18 Wis. 529; Bygrave v. Met. Board of Works, 32 Ch. D. 147.

² Clark v. Teller, 50 Mich. 618; People v. Wasson, 64 N. Y. 167; Anderson v. St. Louis, 47 Mo. 479; Mobile & G. R. v. Ala. Mid. R., 87 Ala. 520; Lake Shore & M. R. v. Chicago & W. R., 96 Ill. 125.

³ Bass v. Fort Wayne, 121 Ind. 389. ⁴ Shenandoah Val. R. v. Robinson, 82 Va. 542. See Carpenter v. Easton & A. R., 24 N. J. Eq. 249, 408; s. c. 26 N. J. Eq. 168.

⁵ Wiggin v. New York, 9 Paige, 16. ⁶ See Port Huron & N. R. v. Callanan, 61 Mich. 22.

⁷ Wells v. Bridgeport Hydraulic Co., 30 Conn. 316.

⁸ McIntyre v. Easton & A. R., 26

§ 381. Equitable jurisdiction in respect to the essential obligations of the eminent domain is well-established, as will be shown presently. But, before considering specific forms of relief, it is advisable to note the bearing of certain familiar principles of equity upon the subject. It has been held that upon a claim for relief based upon a case not yet passed upon by the law courts of the jurisdiction, a court of equity should not settle the novel question of law, and thereupon afford relief, unless perhaps in a case of evident and pressing necessity.¹ The rule that a court of equity will not aid a suitor where there is an adequate remedy at law is often applied in cases of injury from the promotion of public works.² Thus, where an abutting owner seeks to enjoin the construction of a railroad in a street, in which he has no estate, the relief will not be granted.³ The rule that equitable relief will not be granted to a suitor, whose own position is defective by reason of a fault or mistake which would be approved by the affirmative action of the court, is sometimes applicable in cases involving the eminent domain.⁴ Thus, if a corporation seeks to prevent a condemnation of its property on the ground that it is already devoted to public use,⁵ it has no standing in equity if it can be shown that the property in question is not so used,⁶ or is misused.⁷ A lessee of land resisted its condemnation by a railroad corporation on the ground of want of power. The president of a rival railroad took an assignment of the lease, and sought to enjoin the corporation. The court refused to lend its aid to a discreditable effort to suppress competition, and left the assignee to his remedy at law.⁸

N. J. Eq. 425; *Platt v. Bright*, 29 N. J. Co. v. Heiss, 141 Ill. 35; *Arbenz v. Wheeling & H. R.*, 33 W. Va. 1; *Denver, N. & P. R. v. Barsaloux*, 15 Col. 290.

¹ *Morris & E. R. v. Prudden*, 20 N. J. Eq. 530; *Halsey v. Rapid Transit St. Ry.*, 47 N. J. Eq. 380. See *Higbee v. Camden & A. R.*, 20 N. J. Eq. 435. ⁴ *Bell v. Hull & S. R.*, 1 Ry. Cas. 616.

² *Wiggin v. New York*, 9 Paige, 16. ⁵ See §§ 97, 98. ⁶ *Troy & B. R. v. Boston, H. T. & W. R.*, 86 N. Y. 107.

³ *Osborne v. Missouri Pacific R.*, 147 U. S. 248; *O'Brien v. Baltimore Belt R.*, 74 Md. 363; *Potter v. Saginaw St.*, 83 Mich. 285; *Drake v. Hudson River R.*, 7 Barb. 508; *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35; *Arbenz v. Wheeling & H. R.*, 33 W. Va. 1; *Denver, N. & P. R. v. Barsaloux*, 15 Col. 290.

⁷ See *President, etc. v. Trenton City Bridge*, 13 N. J. Eq. 46. ⁸ *Piedmont & C. R. v. Speelman*, 67 Md. 260.

§ 382. *Injunction*. — Courts of equity frequently insist that when their power is invoked to avert or terminate an injury it must appear that the injury is irreparable, and hence not fully remediable by the slower processes of the common law. It has been said that "irreparable" need not be taken in the literal sense, "that there would be no physical possibility of repairing it," it means that it would be "a very grievous injury indeed."¹ Hence, it has been held that a taking of property for public use, without compliance with the conditions imposed for the benefit of property owners, may work an irreparable injury,² though the complaint must clearly set forth the fact of non-compliance, else it will be bad on demurrer.³ According to some decisions, however, where private rights are invaded by those claiming public powers the question of irreparability is wholly irrelevant. The owner is entitled to the speedy and sure relief which a court of equity can afford.⁴ Although the liberal definition of irreparability in *Pinchin v. London & Brighton Railroad Co.*⁵ would probably enable the court to give adequate protection wherever necessary, the latter view seems to be preferable.

The rule that an injunction will not be granted at the suit of one who has slept upon his rights is especially appropriate where the defendants are engaged in a work of public interest, and is frequently enforced.⁶ Thus, where one has stood by while the work was progressing he cannot enjoin it on account of an injury which could have been foreseen, and therefore prevented by timely action.⁷ An injunction has been refused

¹ *Pinchin v. London & B. R.*, 5 De G. M. & G. 851. 136; *West. Union Tel. v. Judkins*, 75 Ala. 428.

² *Pinchin v. London & B. R.*, 5 De G. M. & G. 851. ⁷ *Hentz v. Long Island R.*, 13 Barb. 646; *Midland R. v. Smith*, 113 Ind. 233;

³ *Diedrich v. Northwest Un. R.*, 33 Wis. 219. See *Church v. School Dist.*, 55 Wis. 399. *Kincaid v. Natural Gas Co.*, 124 Ind. 577; *Bassett v. Salisbury Man. Co.*, 47 N. H. 426; *Denver & S. F. R. v. Domke*, 11 Col. 247; *Goodin v. Cincinnati & W. Canal*, 18 Ohio St. 169; *Pennsylvania R. Appeal*, 125 Pa. 189; *Milwaukee & N. R. v. Strange*, 63 Wis. 178; *Organ v. Memphis & L. R. R.*, 51 Ark. 235; *Erie R. v. Delaware, L. & W. R.*, 21 N. J. Eq. 283; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Mitchell v. New Orleans*

⁴ *Pratt v. Roseland R.*, 50 N. J. Eq. 150; *West. Maryland R. v. Owings*, 15 Md. 199; *Beatty v. Beeche*, 23 Neb. 210; *East & West R. v. East. Tennessee, V. & G. R.*, 75 Ala. 275. See also *Kerr, Injunctions*, § 295.

⁵ 5 De G. M. & G. 851.

⁶ *Spencer v. Falls Turnpike*, 70 Md.

where the benefit to the complainant would be so slight that it would be unjust to secure it at the cost of public convenience.¹

If the wrong upon which the application for an injunction is based is remedied after the filing of the bill, an injunction should not be granted,² but, in accordance with the disposition of a court of equity to afford all possible relief in a case where jurisdiction has once attached, the bill may be retained for this purpose. Thus, where an injunction was asked for on account of an appropriation without lawful proceedings, and proceedings were thereafter commenced, the bill was retained for the assessment of damages in respect to injuries sustained before the proceedings were commenced.³

§ 383. An unlawful attempt to appropriate property may be enjoined. The illegality of the appropriation may be predicated upon the inefficiency of the statute, as where the purpose is private,⁴ or where there is no provision for compensation;⁵ or upon neglect to follow the direction of a valid statute, as failure to tender or secure compensation;⁶ or upon the fraudulent character of the proceedings.⁷ Where possession of property is

& N. R., 41 La. An. 363; *Griffin v. Augusta & K. R.*, 70 Ga. 164. See *Acquackanonck Water Co. v. Watson*, 29 N. J. Eq. 366.

¹ *Hackensack Imp. Comm. v. N. J. Midland R.*, 22 N. J. Eq. 94; *Gray v. Manhattan El. R.*, 128 N. Y. 499; *Wood v. Charing Cross R.*, 33 Beav. 290; *Dowling v. Pontypool, C. & N. R.*, L. R. 18 Eq. 714. See also *Potter v. Saginaw St. R.*, 83 Mich. 285; *Hewitt's Case*, 25 N. J. Eq. 210; *Dodge v. Pennsylvania R.*, 43 N. J. Eq. 351; s. c. 45 N. J. Eq. 366; *Van Bokelen v. Brooklyn City R.*, 5 Blatch. 379; *East & W. R. v. East Tenn. V. & G. R.*, 75 Ala. 275.

² See *Atlanta & F. R. v. Blanton*, 80 Ga. 563.

³ *Woodbury v. Marblehead Water Co.*, 145 Mass. 509.

⁴ *Forbes v. Delashmutt*, 68 Iowa, 164; *Barker v. Hartman Steel Co.*, 129 Pa. 551.

⁵ *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Bonaparte v. Camden & A. R.*,

Bald. C. C. 205; *Carson v. Coleman*, 11 N. J. Eq. 106; *Miller v. Morristown*, 47 N. J. Eq. 62; *Watson's Exr. v. Trustees, etc.*, 21 Ohio St. 667; *Carbon, C. & M. Co. v. Drake*, 26 Kan. 345; *Vanderlip v. Grand Rapids*, 73 Mich. 522.

⁶ *Johnson v. Baltimore & N. Y. R.*, 45 N. J. Eq. 454; *Pratt v. Roseland R.*, 50 N. J. Eq. 150; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Sower v. Philadelphia*, 35 Pa. 231; *Curwensville's Appeal*, 129 Pa. 74; *American Tel. etc. Co. v. Pearce*, 71 Md. 535; *Mills v. Mobile*, 47 Ala. 163; *Williams v. New Orleans, M. & T. R.*, 60 Miss. 689; *Provolt v. Chicago, R. I. & P. R.*, 69 Mo. 633; *Parker v. East Tennessee, V. & G. R.*, 13 Lea, 669; *Allgood v. Merrybent & D. R.*, 33 Ch. D. 571. See *Colwell v. May's Landing, etc. Co.*, 19 N. J. Eq. 245.

⁷ *Cincinnati, L. & C. R. v. Danville & V. R.*, 75 Ill. 113. See *Lower v. Chicago, B. & Q. R.*, 59 Iowa, 563; *Port Huron & N. R. v. Callanan*, 61 Mich. 22.

taken under a statute which does not prescribe compensation precedent, and compensation is not paid subsequently, the owner cannot enjoin the undertaking, for he has an adequate remedy at law either by an action for compensation, or by ejectment.¹

Thus far the preventive remedy has been considered in respect to a direct appropriation of property. The apprehension of consequential injury is rarely a reason for enjoining the construction of a public work. As a nuisance is not presumed to result from the prosecution of works authorized by the state,² it follows that their construction will not be enjoined upon an allegation that probably a nuisance will be created.³

§ 384. The decree upon an injunction should be framed so as to conserve the public interest in the undertaking, when this can be done without substantially impairing the rights of the complainant. In the unusual case of an undertaking of absolutely no standing at law there is, of course, no legitimate public interest to oppose its suppression. It should be noted that an injunction, perpetual in terms, does not, necessarily, give to the complainant a vested right to the perpetual cessation of the act enjoined. Altered circumstances may justify a court in entertaining a bill of review for the modification of the decree.⁴ The perpetual injunction of an illegal proceeding does not prevent the subsequent institution of a valid one.⁵ As a rule the introductory proposition is applicable to the cases with which we are concerned. The decree should be conditional, permitting the corporation to legalize its possession and use wherever possible, and thus averting an actual stoppage of the public work.⁶ In the leading case of *Henderson v. New York Central Railroad Company*⁷ the defendants had wrongfully laid their tracks on

¹ *Jersey City v. Gardner*, 33 N. J. Eq. 622. Conn. 87; *Bohlman v. Green Bay & M. R.*, 40 Wis. 157; *Provolt v. Chicago, R. L. & P. R.*, 69 Mo. 633; *Chattanooga, R. & C. R. v. Jones*, 80 Ga. 264; *McElroy v. Kansas City*, 21 Fed. Rep. 257; 583.

² See § 140.
³ See *Atty.-Gen. v. Leeds*, L. R. 5 Ch. 239.

⁴ Consult *Sawyer v. Davis*, 136 Mass. 239. *Harrington v. St. Paul & S. C. R.*, 17 Minn. 215. See also *Parkdale v. West*, 12 App. Cas. 602 (Canada).

⁵ *Curran v. Shattuck*, 24 Cal. 427.
⁶ *Taylor v. Bay City St. R.*, 80 Mich. 77; *Borough of Verona*, 108 Pa. 83; *Liams v. New York Cent. R.*, 16 N. Y. 97. ⁷ 78 N. Y. 423; s. c. *sub nom.* *Wil-
Harding v. Stamford Water Co.*, 41

a street, the fee of which was in the plaintiff. A formal injunction was granted, but it was not to be operative unless the defendants should refuse to pay compensation and damages upon tender of a conveyance and release by the owner.¹ This method of equitable relief has been frequently employed to settle the rights of the parties in the New York elevated railway cases. It has been urged indeed that the method is unconstitutional, because, in effect, it enables a court of equity to perform the function of assessing compensation, which the Constitution declares shall be performed by a special tribunal. But it is held that injunction does not issue to compel payment, but to stop the operation of the railway, and that the court does not usurp any function by adding the condition that, in the event of payment of compensation, the injunction shall not be effective.²

§ 385. **Bill in Equity for Compensation.** — In some cases bills in equity may be entertained because there is no adequate redress at law.³ A landowner destroyed a dam upon his land, and permitted drain commissioners to enter, relying on a parol contract for compensation. Chancellor Kent declared the contract void according to the statute of frauds, but retained the owner's bill, and awarded an issue of *quantum damnificatus* on account of the liability to pay for property taken for public use.⁴ Where compensation was assessed without reference to the rights of a mortgagee of the property taken, he was permitted to maintain a bill in equity against the corporation and the mortgagor, to the end that his debt be paid out of the compensation.⁵ Where the owner of property condemned retains a lien in the nature of a vendor's lien,⁶ he may enforce it in an equitable action.⁷ Various forms of relief have been recommended. Judge Redfield suggested that a receiver should be

¹ See also *Shepard v. Manhattan El. Ry.*, 117 N. Y. 442.

² *Galway v. Met. El. R.*, 128 N. Y. 132.

³ *Walker v. Charleston*, Bailey's Ch. 443.

⁴ *Phillips v. Thompson*, 1 Johns. Ch. 131.

⁵ *Wood v. Westborough*, 140 Mass. 403.

⁶ See § 228.

⁷ *Elwell v. Eastern R.*, 124 Mass. 160. See also *Manchester & K. R. v. Keene*, 62 N. H. 81.

appointed,¹ but this course has been criticised as needlessly expensive, and it has been held that the undertaking should be enjoined until compensation is paid.² Where the owner has a lien for compensation, in the nature of a mortgage lien, he may enforce it by foreclosure.³ If one is entitled to compensation as mortgagee of the premises in question he may make the corporation a party to foreclosure proceedings.⁴ A corporation entered upon mortgaged premises under an agreement with the owner. A suit for foreclosure was brought, to which the corporation was made a party. It was decreed that the corporation should contribute to the payment of the mortgage debt, if the same be not paid by the sale in the inverse order of alienation of other property covered by the mortgage, to the extent of the value of the part appropriated by it at the time of the appropriation, with interest thereon.⁵

REMEDIES OF PUBLIC AGENTS.

§ 386. Agents charged with the promotion of public works may bring such actions at law, or equity, as are necessary for the protection of their rights in the property condemned, and for the maintenance of the works. Trespass may be brought in a proper case.⁶ Possession may be recovered by an action of ejectment,⁷ and this wherever the right to possession is exclusive, although the interest condemned is called an easement.⁸ It has been argued that one ousted from the possession of a railroad cannot maintain an action of forcible entry and detainer, because a railroad is a complex kind of incorporeal heredita-

¹ See also *Munn v. Isle of Wight R.*, L. R. 5 Ch. 414; *Evans v. Missouri, I. & N. R.*, 64 Mo. 453.

² *Kittell v. Missisquoi R.*, 56 Vt. 96. See also *Cooper v. Anniston & A. R.*, 85 Ala. 106.

³ *Frelinghuysen v. Central R.*, 28 N. J. Eq. 388. See *Knapp v. McAuley*, 39 Vt. 275; *Gillison v. Savannah & C. R.*, 7 S. Car. 173.

⁴ *Kennedy v. Milwaukee & S. P. R.*, 22 Wis. 581; *Warwick Inst. etc. v. Providence*, 12 R. I. 144.

⁵ *North Hudson County R. v. Booraem*, 28 N. J. Eq. 450. See also *Dows v. Congdon*, 16 How. Pr. 571.

⁶ *Troy & B. R. v. Potter*, 42 Vt. 265.

⁷ *Ligat v. Commonwealth*, 19 Pa. 458.

⁸ *Hoboken Land, etc. Co. v. Hoboken*, 36 N. J. L. 540; *New York, S. & W. R. v. Trimmer*, 53 N. J. L. 1; *Pittsburgh, F. W. & C. R. v. Peet*, 152 Pa. 488. But see *Racine v. Crotzenberg*, 61 Wis.

ment the possession of which is not changed by such entry and detainer, but this objection has been overruled.¹

The corporation may have equitable relief in a proper case.² Where a corporation has trespassed, when it should have condemned, a court of equity has permitted it to ward off a multiplicity of actions by paying full compensation, and thereby establishing a rightful position.³ So, a court of equity will prevent an owner from dispossessing a corporation which has wrongfully entered upon his land, but is willing to pay full compensation,⁴ and will decree that, upon payment, the owner shall convey the land, or that, if he refuses, payment into court shall be equivalent to conveyance.⁵ The interest condemned by a railroad corporation, though called an easement, is sufficient to enable it to maintain a bill in equity to compel the removal of an obstruction in a street whereby access is impaired.⁶ In 1858 the town of Plymouth was ordered to pay compensation to a mill corporation for a diminution of its water supply caused by the construction of water-works. In 1862 the town filed a bill in equity to set aside the award, and offered evidence to prove that the supply had not been in fact diminished. Relief was refused because the new evidence was found to be merely cumulative, and because it appeared that the town was in *laches*.⁷

ESTOPPEL

§ 387. The lawfulness, or at least the defensibility, of a condemnation and its incidents, is often based upon the acquiescence, actual or presumed, of the property owner. Acquiescence may be found by applying the general principles of estoppel to the particular case, or it may be predicated upon a declaration

¹ *Iron Mt. & H. R. v. Johnston*, 119 U. S. 608.

² *Coe v. New Jersey Midland R.*, 30 N. J. Eq. 21; *Jersey City v. Cent. R.*, 40 N. J. Eq. 417; *Galveston, H. & S. A. R. v. Blakeney*, 73 Tex. 180. See *Keokuk & N. W. R. v. Donnell*, 77 Iowa, 221; *Myers v. South Bethlehem*, 149 Pa. 85; *Lancashire & Y. R. v. Evans*, 15 Beav. 322; *Montgomery & W. P. R. v. Walton*, 14 Ala. 207.

³ *South Carolina R. v. Steiner*, 44 Ga. 546; *Henderson v. New York Cent. R.*, 78 N. Y. 423. See § 384.

⁴ See § 379.

⁵ *Paterson, N. & N. Y. R. v. Kamlah*, 47 N. J. Eq. 331.

⁶ *Pennsylvania S. V. R. v. Reading Paper Mills*, 149 Pa. 18.

⁷ *Plymouth v. Russell Mills*, 7 Allen, 438.

of the statute law, as in a case within a statute of limitations.¹ The doctrine of estoppel has been necessarily touched upon in various places, but its application will be best appreciated by considering it as a whole. It should be noted that where there is a waiver of rights in respect to specific property the estoppel is binding on all to whom the property may pass.² The benefit of constitutional guarantees in respect to private property may be waived by the owner.³ Where a city condemns land for a private use, which, however, it could have purchased, and the owner accepts compensation, he waives the constitutional infirmity, and consents to the appropriation.⁴ Where a corporation tries to make an unlawful disposition of land, not needed for its own use, the owner is not estopped from objecting because he did not at the time of condemnation allege that an excessive quantity was demanded, for in view of the right of the corporation to extend its works the owner was not then in a position to make the allegation.⁵ The filing of a petition for compensation may preclude the petitioner from questioning the constitutionality of the statute,⁶ but if his action is plainly intended to save his rights, in case the statute should be valid, he may nevertheless attack its constitutionality.⁷ Where an owner objects to condemnation, but consents to the appointment of commissioners, he may, after the objection has been overruled, have the proceedings set aside after the use has been determined to be private in a suit brought by another owner. In such a case the tribunal is without jurisdiction.⁸

§ 388. The right to compensation is not waived except by such conduct as is plainly inconsistent with an intention to assert it.⁹ One petitioning for a public work does not thereby

¹ See § 392.

566. See also *Gt. Falls Man. Co. v. Atty.-Gen.*, 124 U. S. 581.

² *Haskell v. New Bedford*, 108 Mass. 208; *Moore v. Roberts*, 64 Wis. 538; *Gurnsey v. Edwards*, 26 N. H. 224. See also *Merchants, etc. Co. v. Chicago, R. I. & P. R.*, 79 Iowa, 613. See *Battles v. Braintree*, 14 Vt. 348.

⁴ *Embury v. Connor*, 3 N. Y. 511.

⁵ *Platt v. Pennsylvania Co.*, 43 Ohio St. 228.

⁶ *Pitkin v. Springfield*, 112 Mass. 509.

⁷ *Moore v. Sandford*, 151 Mass. 285.

⁸ *Detmold v. Drake*, 46 N. Y. 318; *Brooklyn v. Copeland*, 106 N. Y. 196; *St. Louis & S. F. R. v. Foltz*, 52 Fed. Rep. 627; *Tharp v. Witham*, 65 Iowa,

⁹ *Niagara Falls & W. R.*, 121 N. Y.

Woodward v. Webb, 65 Pa. 254;

Craig v. Lewis, 110 Mass. 377; *Gilman*

waive compensation in respect to such of his property as may be taken for it.¹ Where a member of a common council owns land upon a certain street, and votes to permit the construction of a railroad therein, his action is not personal, and therefore does not estop him from recovering indemnity for the damage inflicted upon his lot.² The mere consent to an entry upon land is not a waiver.³ Although one may waive a trespass upon his property by standing by while improvements are made,⁴ he does not thereby waive compensation.⁵ Still less is one estopped by the mere fact of his being aware of the occupation of his land.⁶ But a right to compensation in advance may be lost by letting a wrongful occupation pass without protest.⁷ Where land is appropriated unlawfully a conveyance to the trespasser ratifies the taking, but does not estop the vendor from claiming just compensation.⁸ One does not waive compensation for land taken for a street by selling lots with reference to the street as mapped. This does not imply a dedication, but simply a recognition of the existence of the street.⁹ It has been held that a constitutional requirement that compensation shall be prepaid, or secured, does not prevent the legislature from conditioning this upon the presentation of a claim.¹⁰ And if it be enacted that a claim shall be presented within a specified time,¹¹ a failure to present is a waiver.¹² A waiver by parol has been deemed sufficient.¹³

v. Sheboygan & F. R., 40 Wis. 653. See *Bloomfield R. v. Grace*, 112 Ind. 128. also *Warren v. Spencer Water Co.*, 143 Mass. 9.

¹ *Turner v. Stanton*, 42 Mich. 506; ⁷ *Taylor v. Chicago, M. & S. P. R.*, 63 Wis. 327. See *Chicago, M. & S. P. R. v. Randolph Town-site Co.*, 103 Mo. 451.

Newville Road, 8 Watts, 172. See Penn ⁸ *Longworth v. Cincinnati*, 48 Ohio Mut. Life Ins. Co. *v. Heiss*, 141 Ill. 35. St. 637.

² *Lamm v. Chicago, S. P. etc. R.*, 45 ⁹ *Jersey City v. Sackett*, 44 N. J. L. Minn. 71. See *Wolfe v. Covington & L. R.*, 15 B. Mon. 404. 428.

³ *Evansville & R. R. v. Charlton*, 33 ¹⁰ *Reckner v. Warner*, 22 Ohio St. N. E. Rep. 129 (Ind. 1893). 275. See also *Abbott v. Supervisors*, 36 Iowa, 354.

⁴ See §§ 379, 382.

¹¹ See § 392.

⁵ *West. Pennsylvania R. v. Johnston*, ¹² *Benedict v. State*, 120 N. Y. 228. 59 Pa. 290; *Erie R. v. Delaware, L. & See also Brookville, etc. Co. v. Butler*, 91 Ind. 134.

W. R., 21 N. J. Eq. 283; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366. See also ¹³ *Cory v. Chicago, B. & K. C. R.*, 100 Mo. 282; *Pratt v. Des Moines & N. Manchester & K. R. v. Keane*, 62 N. H. 81. R., 72 Iowa, 249; *Cottrill v. Myrick*, 12

§ 389. Where an owner appears and participates in the proceedings his action is considered as a waiver of certain irregularities,¹ such as neglect to treat for purchase before condemning,² failure to give proper notice,³ and neglect of the tribunal to take the prescribed oath.⁴ Wherever an appearance is alleged in bar of an objection to the proceedings it may be shown that an appearance in law cannot be inferred from the facts,⁵ as, for example, where the owner appears to remonstrate and expressly reserves his legal rights,⁶ and where he appears as a witness in obedience to a summons.⁷

Acceptance of compensation is a waiver of all irregularities in the proceedings to condemn.⁸ But it has been held that where an award to a municipal corporation is directed to be paid to the city chamberlain his simple receipt will not estop the corporation from appealing, provided it appears that the city has not used the money, or in any way assumed control of it.⁹ The owner cannot at once acquiesce in the propriety of proceedings to condemn by claiming compensation, and assert that the proceedings are invalid.¹⁰

§ 390. If there are irregularities in the proceedings, and the owner neglects to avail himself of an opportunity to take advantage of them, they will be presumed to be waived.¹¹ Upon the

Me. 222; *Fuller v. County Comm.*, 15 Pick. 81. See also *Embury v. Connor*, 3 N. Y. 511; *White v. County Comm.*, 2 Cush. 361. But see *McKee v. Hull*, 69 Wis. 657. See § 131.

¹ *Hercules Iron Works v. Elgin, J. & E. R.*, 141 Ill. 491; *Rochester, H. etc. R.*, 19 Abb. N. C. 421.

² *Wilson v. Trenton*, 53 N. J. L. 178.

³ *Skinner v. Lake View Ave. Co.*, 57 Ill. 151; *Stephens v. Comm.*, 36 Kan. 664.

⁴ *Rockford, R. I. & S. L. R. v. McKinley*, 64 Ill. 338; *Raymond v. County Comm.*, 63 Me. 110.

⁵ *Minneapolis & S. L. R. v. Kanne*, 32 Minn. 174.

⁶ *State v. Jersey City*, 25 N. J. L. 309. See also *Spurrier v. Wirtner*, 48 Iowa, 486.

⁷ *People v. Osborn*, 20 Wend. 186.

⁸ *Hatch v. Hawkes*, 126 Mass. 177; *Prescott v. Patterson*, 49 Mich. 622; *Kile v. Yellowhead*, 80 Ill. 208; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57; *Hawley v. Harrall*, 19 Conn. 142; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Denver City, etc. Co. v. Middaugh*, 12 Col. 434.

⁹ *New York & H. R.*, 98 N. Y. 12.

¹⁰ *Pinkham v. Chelmsford*, 109 Mass. 225; *Gt. Falls Man. Co. v. Atty.-Gen.*, 124 U. S. 581. See also *Railroad Co. v. Robbins*, 35 Ohio St. 531; *Marquette, H. & O. R. v. Harlow*, 37 Mich. 554.

¹¹ *New York, W. S. & B. R.*, 35 Hun. 575; *Bradley v. Frankfort*, 99 Ind. 417; *St. Joseph Hydraulic Co. v. Cincinnati, W. & M. R. R.*, 109 Ind. 172; *Crowell v. Londonderry*, 63 N. H. 42; *Noyes v.*

completion of proceedings duly authorized, and brought before a competent tribunal, they have the force and effect of an ordinary judgment. They cannot be attacked collaterally.¹ Where proceedings to condemn are invalid either through lack of constitutional authority, or neglect of jurisdictional requirements, they may be collaterally impeached.²

§ 391. **When are Public Agents Estopped?**—Corporations may, in some cases, plead *ultra vires* in defence to a claim for injuries to property.³ But they are estopped, as a rule, from taking advantage of their own wrong or mistake where they proceed under an authority, sufficient in itself, or made sufficient by the acquiescence of the property owner.⁴ Where one has built a dam by authority of the legislature he cannot avoid paying damages for flooding land by asserting that the statute is unconstitutional because it does not provide for the assessment of damages by a jury.⁵ A corporation cannot plead an agreement in bar of an action if it has not kept the agreement.⁶

LIMITATION OF ACTIONS.

§ 392. Wherever compensation is to be recovered in a statutory action by the owner, the legislature may prescribe the period within which the action shall be brought.⁸ It is essential that limitation laws afford a reasonable time for bringing suit, else they deprive one of his property without due

Springfield, 116 Mass. 87; State v. Nelson, 57 Wis. 147; Supervisors v. Stout, 9 W. Va. 703; Smith v. School Dist., 40 Mich. 143.

¹ Huling v. Kaw Val. R., 130 U. S. 559; Townsend v. Chicago & A. R., 91 Ill. 545; Brimmer v. Boston, 102 Mass. 19; Dyckman v. New York, 5 N. Y. 434; Miller v. Prairie du Chien & M. R., 34 Wis. 533; Williams v. Mitchell, 49 Wis. 284; Thompson v. Chicago, S. F. & C. R., 110 Mo. 147; Chicago, K. & N. R. v. Griesser, 48 Kan. 663; Butman v. Vermont Cent. R., 27 Vt. 500; Morris & E. R. v. Hudson Tunnel R., 38 N. J. L. 548; McDonald v. Payne, 114 Ind. 359. See also Indiana Oolitic Limestone Co. v. Louisville, N. A. & C. R., 107 Ind. 301.

² Chicago & N. W. R. v. Galt, 133 Ill. 657.

³ See § 119.

⁴ Buell v. Lockport, 8 N. Y. 55.

⁵ People v. Murray, 5 Hill, 468.

⁶ Bertsch v. Lehigh, C. & N. Co., 4 Rawle, 130; Philadelphia, N. & N. Y. R. v. Cooper, 105 Pa. 239; Hooper v. Columbus & W. R., 78 Ala. 213; Hartley v. Keokuk & N. W. R., 52 N. W. Rep. 352 (Iowa, 1892). See New York & G. L. R. v. Stanley's Heirs, 34 N. J. Eq. 55.

⁷ See § 362.

⁸ Rexford v. Knight, 11 N. Y. 308; Mark v. State, 97 N. Y. 572; Call v. County Comm., 2 Gray, 232.

process of law.¹ Although the spirit of this requirement is generally observed in the laws limiting actions in respect to condemnation, it seems to have been hardly respected in some decisions.² Thus, sixty days from the passage of an act establishing a highway has been deemed a sufficient time within which to claim compensation for land taken, the statute itself, public in nature though private in name, giving constructive notice.³ Although there may not have been in fact a denial of justice in the decisions just cited, yet when it is recalled that one's property may be taken upon constructive notice,⁴ and that the only redress may be the statutory action,⁵ it is clear that a short period of limitation may in fact affect seriously the constitutional right to compensation.

§ 393. In conformity to the strict rule of construction which is applied to the law of limitation, no less than to the eminent domain, the court must be satisfied that the limitation pleaded is plainly intended to fit the case at bar.⁶ Hence, where it is enacted that parties injured by the improvement of a street can bring an action within three years, one, whose property abuts on a section of a street raised far above the grade line by means of a viaduct, is not affected by the limitation, for the viaduct is not strictly an improvement of the street, but a new way.⁷ Where there is no period specially prescribed for the bringing of actions in respect to expropriation, it is generally held that the public agent cannot plead in bar a general statute limiting actions for trespass,⁸ breach of contract,⁹ or equitable relief.¹⁰ But one who wrongfully appropriates property may rely on an adverse possession for the statutory period.¹¹

¹ See *Philadelphia v. Wright*, 100 Pa. 235.

² See *Lincoln v. Colusa County*, 28 Cal. 662; *Potter v. Ames*, 43 Cal. 75.

³ *Minnesota v. Messenger*, 27 Minn. 119.

⁴ See § 337.

⁵ See § 363.

⁶ *Delaware, L. & W. R. v. Burson*, 61 Pa. 369; *Mark v. State*, 97 N. Y. 572; *Benedict v. State*, 120 N. Y. 228; *Lawrence R. v. Cobb*, 35 Ohio St. 94.

⁷ *Cohen v. Cleveland*, 43 Ohio St. 190.

⁸ *Donnelly v. Brooklyn*, 121 N. Y. 9; *Shortle v. Louisville, N. A. & C. R.*, 130 Ind. 505. See *Houston & T. C. R. v. Chaffin*, 60 Tex. 553.

⁹ *Kellar v. Harrisburg & P. R.*, 151 Pa. 67; *Jersey City v. Sackett*, 44 N. J. L. 428; *Kendall v. Missisquoi & C. R.*, 55 Vt. 438.

¹⁰ *Gilman v. Sheboygan & F. R.*, 40 Wis. 653.

¹¹ *Railroad Co. v. O'Harra*, 48 Ohio St. 343; *Sherlock v. Louisville, N. A. & C. R.*, 115 Ind. 22. See also *Han-*

§ 394. The period of limitation begins to run the moment the cause of action is complete. This point may be fixed by statute, as when it is declared that suit must be brought within a certain time after the passage of the act.¹ If the action is to be begun within a fixed time after the completion of the work it has been held that the completion of the whole undertaking is meant,² but, unless this conclusion is demanded by the express words of the statute, the better opinion is that the legislature means the completion of the part of the undertaking upon the land in question.³ The completion of the taking is often declared by the statute to be the time from which the period of limitation begins to run, and is the proper time where the statute is silent. Where inchoate appropriation is permitted,⁴ the period is not begun until the appropriation is completed.⁵ An authorization to appropriate, not followed by action, is not treated as an appropriation. Hence, where an order to open a street is delivered to the proper authorities, who take no steps to carry it out, the period of limitation does not run from the receipt of the order.⁶ But a definite assertion of dominion over property may be equivalent to an actual appropriation. Thus, where a city, by a vote of its council, perfects a right to take the waters of a stream, the period within which the owner must seek compensation begins to run at once, and not at the time when the waters are actually diverted.⁷ The distinction between a single and a continuing trespass⁸ is material in determining the commencement of the period of limitation. If the trespass is a continuing one a new period is ushered in on every day of its continuance.⁹ Important too is the rule, applicable to all actions, that an injury actually suffered after the original period of limitation, but referable to the original cause of action, is barred as a part thereof.¹⁰ The fact that

num v. West Chester, 63 Pa. 475. See § 133. ⁵ *Brower v. Philadelphia*, 142 Pa. 350.

¹ *Rexford v. Knight*, 11 N. Y. 308; ⁶ *Volkmar St.*, 124 Pa. 320.

Minnesota v. Messenger, 27 Minn. 119.

⁷ *Worcester Gas Light Co. v. County*

² *Commonwealth v. Fisher*, 1 Pen. & Watts, 462. Comm., 138 Mass. 289.

⁸ See §§ 308, 309.

³ *Commonwealth v. McAlister*, 2 Watts, 190. See *Hendrick v. Carolina Central R.*, 101 N. C. 617.

⁹ *Galway v. Met. El. Ry.*, 128 N. Y. 132; *Baltimore & P. R. v. Fifth Baptist Church*, 108 U. S. 317.

⁴ See § 201.

¹⁰ *Davis v. New Bedford*, 133 Mass. 549. See also §§ 129, 163.

the defendant corporation has instituted proceedings to condemn within the alleged period of limitation is a sufficient acknowledgment of the owner's title to take the case out of the statute.¹ Where a corporation occupies land, and pleads a statute in bar of an action, the owner may take the case out of the statute by proving that the parties had negotiated for a settlement during the alleged period of limitation.²

¹ *Hull v. Chicago, B. & Q. R.*, 21 Neb. 371.

² *Perkins v. Maine Cent. R.*, 72 Me. 95.

CHAPTER XIII.

THE IMPROVEMENT AND USE OF STREETS.

§ 395. The improvement of a street, or its use for purposes other than that of a way for ordinary vehicles, is often detrimental to private property. Many of the most important questions in respect to the liability of the promoters of public works for injuries to property have been raised by such improvement or use. Some of these questions are comparatively novel. Others, supposed to have been settled, have been reopened by the introduction of new methods of transportation and transmission. Legislation, both constitutional and statutory, has cleared or confused the situation according to the amount of legal sense behind it. Finally, courts of the highest rank have come to different conclusions upon fundamental questions.

§ 396. It will be assumed that the strip of land in question has passed into the control of the public for street purposes, for until it is definitely set apart for the public use private rights therein are not divested.¹ Hence, a railroad company authorized to lay tracks upon land laid out, but not opened, as a street, must compensate the owner thereof.² In a recent case land occupied by a railroad company had been dedicated for a street in 1858, but had since remained in its natural condition. An adjoining owner claimed compensation for a permanent injury to his right of access. The court refused to approve such a basis of assessment, as the street was not in final shape, but directed a recovery for such injury as had been sustained to

¹ *Baltimore & O. R. v. Boyd*, 63 Md. 121 Pa. 35; *Wichita & W. R. v. Fecheimer*, 36 Kan. 45. See also *Beidler's Elizabethtown & P. R. v. Thompson*, 79 Appeal, 23 W. N. C. (Pa.) 451; *Jarden v. Philadelphia, W. & B. R.*, 3 Whart. Ky. 52.

² *Quigley v. Pennsylvania S. V. R.*, 502.

date of suit.¹ Public authorities, empowered to lay sewers through streets, cannot enter for this purpose upon land on which a street has not been regularly laid out.²

§ 397. The fee of the land used for a street is usually in the abutting owner, the public having an easement sufficient to support the use. Where the fee is in the public it is usually a base fee conditioned on the maintenance of the public interest.³ While it will appear that important distinctions have been drawn between streets where the fee is in the public and those where it is in private hands, the means whereby the land is impressed with the public servitude do not condition its use. Thus, the public interest obtained by dedication is equal to the interest acquired by purchase or condemnation.⁴

The public interest in a street, whatever its character, is vested in the state, not in the municipality or other subordinate political corporation,⁵ unless the constitution provides otherwise.⁶ Upon principle the control of the state over streets is plenary, but it may be qualified by the constitution. Thus in New York a street railroad company cannot use a street without the consent of the local authorities.⁷ It follows from the state ownership of streets that a right to use a street for any purpose out of the common must be given by the legislature either directly, or by duly authorizing an agent, usually a municipal corporation.⁸ And the authority given will not be construed so broadly as to enable the municipality to grant a perpetual or exclusive use of the streets.⁹ Where this right is not conditioned on the assent of the abutting owner¹⁰ he has no interest which will

¹ *Smith v. Kansas City, S. J. & C. B. R.*, 98 Mo. 20. 72 Wis. 184. See also *State v. Shawnee County*, 28 Kan. 431.

² *Rhinelanders Case*, 68 N. Y. 105. ⁶ *St. Louis v. West. Union Tel. Co.*, 149 U. S. 465.

³ *Paul v. Detroit*, 32 Mich. 108; *Gerhardt v. Reeves*, 75 Ill. 301. See also *People v. Kerr*, 27 N. Y. 188. See ⁷ *New York Dist. R.*, 107 N. Y. 42; *Third Ave. R.*, 121 N. Y. 536.

⁴ *Mercer v. Pittsburgh, F. W. & C. R.*, 36 Pa. 99; *Montgomery v. Townsend*, 80 Ala. 489. ⁸ *Mercer v. Pittsburgh, F. W. & C. R.*, 36 Pa. 99; *Stanley v. Davenport*, 54 Iowa, 463; *Davis v. New York*, 14 N. Y. 506.

⁵ *District of Columbia v. Baltimore & P. R.*, 114 U. S. 453; *Arbenz v. Wheeling & H. R.*, 33 W. Va. 1; *People v. Walsh*, 96 Ill. 232; *State v. Hilbert*, 9 Milhau v. Sharp, 27 N. Y. 611; *Grand Rapids St. R'ys*, 48 Mich. 433.

¹⁰ See § 330.

enable him to question the existence of authority in a given case, unless he can show that the use in question injures his property.¹ But if injury can be shown the authority may be questioned,² for without authority no man's property can be taken, or subjected to a nuisance.

THE IMPROVEMENT OF STREETS.

§ 398. The widening of a street by taking adjoining land must be accomplished of course by the eminent domain. And it has been held that the narrowing of a street may so injure the easement of an abutting owner as to entitle him to compensation.³

According to the common law the public authorities may grade streets without liability for any injury whatsoever to abutting property which may result from the proper execution of the work.⁴ The rule has been widely sustained on principle in this country, where the injury in question is not a physical encroachment on the abutting property.⁵ Where the injury is a physical encroachment, such as the casting of earth or water upon abutting land, it has been frequently held that the common law is superseded by the rule of the eminent domain, — that compensation may be obtained as for land taken for public use,⁶ and it has been further held that, upon principle, land abutting

¹ *Detroit City R. v. Mills*, 85 Mich. 634; *Van Horne v. Newark Pass. R.*, 48 N. J. Eq. 332.

² *Perry v. New Orleans, M. & C. R.*, 55 Ala. 413; *Daly v. Georgia South. & F. R.*, 80 Ga. 793; *Fanning v. Osborne*, 102 N. Y. 441; *Porth v. Manhattan R.*, 55 N. Y. Super. 366.

³ *Rennselaer v. Leopold*, 106 Ind. 29. See also *Moose v. Carson*, 104 N. C. 431; *Williams v. Carey*, 73 Iowa, 194. See *Gates v. Kansas City Bridge*, 111 Mo. 28.

⁴ *Governor, etc. v. Meredith*, 4 T. R. 794.

⁵ *Smith v. Washington*, 20 How. 135; *Callender v. Marsh*, 1 Pick. 417; *Radcliff's Exrs. v. Brooklyn*, 4 N. Y. 195; *Pontiac v. Carter*, 32 Mich. 164;

O'Connor v. Pittsburgh, 18 Pa. 187; *Quincy v. Jones*, 76 Ill. 231; *Hovey v. Mayo*, 43 Me. 322; *Reynolds v. Shreveport*, 13 La. An. 426; *Fallowes v. New Haven*, 44 Conn. 240; *Henderson v. Minneapolis*, 32 Minn. 319; *Rounds v. Mumford*, 2 R. I. 154; *Kahrer v. Richmond*, 81 Va. 745; *Smith v. Eau Claire*, 78 Wis. 457.

⁶ *Nevins v. Peoria*, 41 Ill. 502; *Hendershott v. Ottumwa*, 40 Iowa, 658; *Vanderlip v. Grand Rapids*, 73 Mich. 523; *Keating v. Cincinnati*, 38 Ohio St. 141; *Broadwell v. Kansas City*, 75 Mo. 213; *Gray v. Knoxville*, 85 Tenn. 99. See *Noonan v. Albany*, 79 N. Y. 470; *Moore v. Albany*, 98 N. Y. 396; *Rutherford v. Holley*, 105 N. Y. 632.

on a street is entitled to lateral support as if the street were private property.¹

§ 399. In most of the cases thus far cited the grading of streets has been done to increase their utility as common ways. It has been held also that, as a bridge for ordinary traffic is but a link in the system of highways, the making of suitable approaches is on the same footing as an ordinary change of grade.² But it frequently happens that graduation is necessary in order to facilitate the construction of a work of public interest, especially a railroad. In this case compensation is not due on account of graduation, if none can be claimed on account of the work itself.³

It may be that, while the established grade presents no obstacle to the construction of the work, an alteration must follow such construction in order to maintain the highway use. Thus, where a railroad is laid along a street, the regrading of intersecting streets is often necessary to make safe and convenient crossings. It has been decided in this case, that even though the railroad itself may impose an additional servitude on the fee, the change of grade may be made without compensation, the cause of the change being irrelevant, and its purpose — the improvement of a street — being attainable without liability.⁴ So, a railroad corporation has been permitted to grade the highway approach to its station without compensating the owner of the fee, as the work is considered a mere alteration in grade, undertaken by the corporation instead of by the city.⁵ But other decisions do not recognize a distinction in this respect between the construction of a railroad along a street, and a change of grade on account of the construction of a railroad across it, and

¹ *Dyer v. St. Paul*, 27 Minn. 457; *Stearns v. Richmond*, 88 Va. 992.

² *Skinner v. Hartford Bridge Co.*, 29 Conn. 523. See *Cohen v. Cleveland*, 43 Ohio St. 190; *Frater v. Hamilton County*, 90 Tenn. 661; *Reed v. Camden*, 53 N. J. L. 322.

³ *Slatten v. Des Moines Val. R.*, 29 Iowa, 148; *Newport & C. Bridge v. Foote*, 9 Bush, 264.

⁴ *Uline v. New York Cent. & H. R. R.*, 101 N. Y. 98; *Conklin v. New York, O. & W. R.*, 102 N. Y. 107; *Rauenstein v. New York, L. & W. R.*, 136 N. Y. 528; *Robinson v. Great North. R.*, 48 Minn. 445; *Whittier v. Portland & K. R.*, 38 Me. 26. See also *Towle v. Eastern R.*, 17 N. H. 519.

⁵ *Wead v. St. Johnsbury & L. C. R.*, 64 Vt. 52.

allow compensation.¹ Where a railroad corporation is made liable for consequential injuries it must compensate for damage due to alterations in grade, although the city may make alterations without liability.²

If the grade of a street be altered so as to aid an undertaking admittedly foreign to the uses of a street, as for example a levee or a dike, compensation should be made for any damage done.³

§ 400. The courts of Ohio long since denied the application of the common-law rule in respect to grading, holding that the constitutional declaration of the eminent domain obliges the authorities to compensate those whose abutting property is injured by a change of grade.⁴ Although the Ohio doctrine does not appear to have affected the judgment of courts in other States,⁵ its equity has been vindicated by numerous constitutional and statutory enactments compelling the payment of compensation for property "damaged," "injuriously affected," etc.⁶ By virtue of these enactments, or statutes of similar import expressly directed to the improvement of streets, the owner of property who suffers a common-law injury by reason of a change of grade may recover compensation.⁷ A change of grade is not within the purview of a statute forbidding a city to close up, use, or obstruct a street without compensation to abutting owners.⁸

¹ *Buchner v. Chicago, M. & S. P. R.*, 60 Wis. 264; *Shealy v. Chicago, etc. R.*, 72 Wis. 471; *Alabama Midland R. v. Williams*, 92 Ala. 277. See also *Baltimore & P. R. v. Reaney*, 42 Md. 117; *Kaiser v. St. Paul, S. & T. F. R.*, 22 Minn. 149; *Sioux City & P. R. v. Weimer*, 16 Neb. 272; *Louisville & N. R. v. Finley*, 86 Ky. 294; *Nicholson v. New York & N. H. R.*, 22 Conn. 74; *Burritt v. New Haven*, 42 Conn. 174; *Nicks v. Chicago S. P., etc. R.*, 84 Ia. 27.

² *Bradley v. New York & N. E. R.*, 21 Conn. 294. See also *Parker v. Boston & M. R.*, 3 Cush. 107.

³ *Shawneetown v. Mason*, 82 Ill. 337. See also *Jeffersonville v. Myers*, 2 Ind. App. 532; *Winchester v. Stevens Point*, 58 Wis. 350.

⁴ *McCombs v. Akron*, 15 Ohio, 474; *Crawford v. Delaware*, 7 Ohio St. 459;

Cincinnati v. Whetstone, 47 Ohio St. 196.

⁵ See *Transportation Co. v. Chicago*, 99 U. S. 635.

⁶ See §§ 153-157.

⁷ *Bloomington v. Pollock*, 141 Ill. 346; *New Brighton v. United Pres. Church*, 96 Pa. 331; *Mellor v. Philadelphia*, 28 Atl. Rep. 991 (Pa. 1894); *Lafayette v. Nagle*, 113 Ind. 425; *Gibson v. Owens*, 115 Mo. 258; *Conklin v. Keokuk*, 73 Iowa, 343; *Aldrich v. Providence*, 12 R. I. 241; *Hammond v. Harvard*, 31 Neb. 635; *Mayor, etc. v. Nichol*, 3 Baxt. 338; *Anderton v. Milwaukee*, 82 Wis. 279; *Sisson v. New Bedford*, 137 Mass. 255; *Montgomery v. Townsend*, 80 Ala. 489; *Reardon v. San Francisco*, 66 Cal. 492.

⁸ *Smith v. Eau Claire*, 78 Wis. 457.

THE USES OF STREETS.

§ 401. **Local Uses.** — Public sewers and drains may be laid in a street without compensation to the abutter, and this without regard to the ownership of the fee,¹ and in like case are mains for the distribution of gas and water.² But a sewer for the benefit of one town cannot be laid through the streets of another without compensation to private owners of the fee.³

Assuming that ways for sewage, water, and gas may be built through a city street without compensation to the abutters, the question arises in respect to works incident or germane to the uses subserved by these ways. It has been held that a public cistern in a street is within the urban servitude for which the land was acquired,⁴ but that a water-tank and pumping engine are not.⁵ In the case of the Manhattan Company, a private corporation,⁶ the court determined that they had not the power to construct a reservoir in a street. The ordinary lamp-post is within the urban servitude,⁷ and so is the pole used for the electric light,⁸ unless it appears that the pole in question is intended to serve private interests only.⁹ It has been held that the owner of the fee cannot have compensation for the erection of a soldiers' monument in the street.¹⁰ A city may erect a raised platform, or walk, for pedestrians so as to completely prevent the access of wagons to the abutter's property, without giving him compensa-

¹ *Matter of Yonkers*, 117 N. Y. 564; *Cone v. Hartford*, 28 Conn. 363; *Cincinnati v. Penny*, 21 Ohio St. 499; *Elster v. Springfield*, 49 Ohio St. 82; *Stoudinger v. Newark*, 28 N. J. Eq. 446; *Boston v. Richardson*, 13 Allen, 146. See *Kelsey v. King*, 1 Trans. Rep. (N. Y.) 133; *Hildreth v. Lowell*, 11 Gray, 345; *Frostburg v. Hitchins*, 70 Md. 56.

² *Crooke v. Flatbush Water Works*, 29 Hun, 245; *Wood v. Nat'l Water Works*, 33 Kan. 590; *McDevitt v. Gas Co.*, 28 Atl. Rep. 948 (Pa. 1894). See *Quincy v. Bull*, 106 Ill. 337; *Providence Gas Co. v. Thurber*, 2 R. I. 15.

³ *Van Brunt v. Flatbush*, 128 N. Y. 50; *Pasadena v. Stimson*, 91 Cal. 238. See *Cummins v. Seymour*, 79 Ind. 491; *Quincy v. Boston*, 148 Mass. 389.

⁴ *Barter v. Commonwealth*, 3 Pen. & W. 253; *West v. Bancroft*, 32 Vt. 367; *Lostutter v. Aurora*, 126 Ind. 436. See also *Louisville v. Osborne*, 10 Bush, 226; *Savage v. Salem*, 23 Or. 381.

⁵ *Morrison v. Hinkson*, 87 Ill. 587.

⁶ 22 Wend. 653.

⁷ See *Story v. New York El. R.*, 90 N. Y. 122, 161.

⁸ *Johnson v. Thomson-Houston Electric Co.*, 54 Hun, 469; *Tuttle v. Brush Electric Co.*, 50 N. Y. Super. 464. See also *Lahr v. Met. El. R.*, 104 N. Y. 268; *Halsey v. Rapid Transit St. R.*, 47 N. J. Eq. 380. Compare *Tiffany v. U. S. Illuminating Co.*, 67 How. Pr. 73.

⁹ *Tiffany v. New York Illuminating Co.*, 51 N. Y. Super. 280.

¹⁰ *Tompkins v. Hodgson*, 2 Hun, 146.

tion. As far as the use of the street for wagons is concerned he is simply one of the general public.¹

The private fee in a rural road cannot be freely subjected to servitudes in favor of urban uses. Hence, the right to lay gas or water pipes in such a road must be condemned.²

§ 402. **Street Railroads.** — A street railroad or tramway is commonly understood to be a railroad for the transportation of passengers from point to point along its route, in single cars, or at most a short train, running upon rails laid in substantial conformity with the established grade. The most marked differences between railroads of this sort are due to the motive power employed, and they will be classified accordingly.

A horse railroad is usually treated as an unimportant variation of the common highway use. It does not impede travel or access, and therefore does not impose a new burden on the fee.³ In New York, however, a horse railroad is said to be inconsistent with the highway easement, differing only in degree from the steam railroad, and it has been held that the fee owner should be compensated for its construction.⁴ But where the fee of the street is in the public a horse railroad may be constructed without compensation to the abutter.⁵ In *Street Railway v. Cummins*,⁶ middle ground is taken. The abutter is entitled to compensation if, in fact, the horse railroad is so located as to impair his access. This rule has been approved in Wisconsin, but relief was denied where the railroad was so placed as to prevent the abutter from unloading drays standing at right angles to the curb, for this private use of the street was deemed per-

¹ *Hobson v. Philadelphia*, 25 Atl. Rep. 1046 (Pa. 1893). 409; *Brown v. Duplessis*, 14 La. An. 842; *Grand Rapids & I. R. v. Heisel*, 38

² *Bloomfield, etc. Gas Light Co. v. Calkins*, 62 N. Y. 386; *Sterling's Appeal*, 111 Pa. 85; *Kincaid v. Natural Gas Co.*, 124 Ind. 577. Mich. 62; *Floyd County v. Rome St. R.*, 77 Ga. 614; *Ransom v. Citizens R.*, 104 Mo. 375; *Hodges v. Baltimore Pass. R.*, 58 Md. 603; *Texas & P. R. v. Rosedale St. R.*, 64 Tex. 80. See *Taylor v. Bay City St. Ry.*, 80 Mich. 77.

³ *Hinchman v. Paterson Horse R.*, 17 N. J. Eq. 75; *Citizens' Coach Co. v. Camden Horse R.*, 33 N. J. Eq. 267; *Elliott v. Fair Haven R.*, 32 Conn. 579; *Atty.-Gen. v. Metropolitan R.*, 125 Mass. 515; *Finch v. Riverside & A. R.*, 87 Cal. 597; *Eichels v. Evansville St. R.*, 78 Ind. 261; *Randall v. Jacksonville R.*, 19 Fla. 404.

⁴ *Craig v. Rochester City, etc. R.*, 39 N. Y. 404. ⁵ *Kellinger v. Forty-Second St. R.*, 50 N. Y. 206.

⁶ 14 Ohio St. 523.

missive only.¹ In a recent case the laying of tracks thirteen inches from the curb was held to impair access to adjoining property, but the right to compensation was based expressly upon the constitutional declaration that compensation should be paid for property damaged for public use.² A railroad on which freight cars are drawn by horses from one steam railroad to another has been held to be an additional burden on the fee. It is distinguished from an ordinary street railroad in that it does not afford a convenience to those who use the street.³

It has been decided that street cars propelled by steam, but otherwise similar to horse cars in that they run at moderate speed and carry no freight, do not impose a new servitude on the fee,⁴ and the fact that the line extends far beyond the city limits is immaterial.⁵ Where the rails are not laid in conformity with the grade of the street, but are placed on a roadbed specially prepared, there is an additional burden on the fee.⁶

It has been held that a cable railroad may be constructed in a street without compensation to the abutter.⁷

§ 403. The use of electricity for the propulsion of street cars is comparatively recent. The electric cars in general use in this country run upon rails similar to those laid for horse cars, and are operated by what is called the trolley overhead system. A wire is suspended over the centre of the track, either from wires stretched at intervals across the street between poles placed at the curbs, or from a pole and arm set close to the track. A pole or trolley, topped by a grooved wheel, is so attached to the car that it can be raised to keep touch with the wire. When this is done the electric current is established, as the rail, or a wire laid along it, is connected with the negative pole of the dynamo

¹ *Hobart v. Milwaukee City R.*, 27 Wis. 194. *v. Davenport*, 54 Iowa, 463, *Stange v. Dubuque*, 62 Iowa, 303; *Street R. v.*

² *Campbell v. Metropolitan R.*, 82 Ga. 320. *Doyle*, 88 Tenn. 747. ⁵ *Newell v. Minneapolis, L. & N. R.*,

³ *Carli v. Stillwater St. R.*, 28 Minn. 373. ⁶ *Nichols v. Ann Arbor & Y. R.*, 87 Mich. 361.

⁴ *Briggs v. Lewiston, etc. R.*, 79 Me. 363; *Williams v. City Electric R.*, 41 Fed. Rep. 556; *Nichols v. Ann Arbor & Y. R.*, 87 Mich. 361; *Paquet v. Mt. Tabor St. R.*, 18 Or. 233. See *Stanley Auburn R.*, 17 W'kly Bull (Ohio) 265. ⁷ *Rafferty v. Cent. Traction Co.*, 147 Pa. 579. See *Lorie v. North Chicago R.*, 32 Fed. Rep. 270; *Harrison v. Mt.*

and carries the return current, and a motor attached to the car is forced into action. It has been held that an electric railway does not impose an additional servitude upon the fee. In *Halsey v. Rapid Transit Railway Company*,¹ the poles were placed in the centre of a street about sixty feet wide, at intervals of one hundred and twenty-five feet. Vice-Chancellor Van Fleet in giving judgment for the company said, "The poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden on the land, but must, on the contrary, be regarded both in law and reason as legitimate accessories to the use of the land for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate."² Where the poles were placed at the curb, the same conclusion has been reached upon reasoning substantially similar.³ In an Ohio case cited,⁴ it was suggested that if poles were so placed as to actually impair access compensation should be paid. This accords with the doctrine of *Street Railway v. Cumminsville*.⁵ It seems that an electric railroad may be laid on a country road without compensation to the owner of the fee.⁶ In answer to the argument that electric railway poles should stand on a footing with telegraph and telephone poles, which have been pronounced an additional burden on the fee,⁷ a distinction has been drawn between the railroad as ministering to the original thoroughfare use, and the telegraph as irrel-

¹ 47 N. J. Eq. 380.

² See also *Kuch v. North Ave. Ry.*, 75 Md. 222. See *Farrell v. Winchester Ave. R.*, 61 Conn. 127.

³ *Taggart v. Newport St. R.*, 16 R. I. 668; *Mt. Adams, etc. R. v. Winslow*, 3 Ohio C. C. 425; *Louisville Bagging Co. v. Cent. Pass. R.*, Louisville (Ky.) Court, 1890; *Detroit City R. v. Mills*, 85 Mich. 634; *Paterson R. v. Grundy*, 26 Atl. Rep. 788 (N. J. 1893); *Lockhart v. Craig St.*

R., 139 Pa. 419; *Rafferty v. Cent. Traction Co.*, 147 Pa. 579. See also *Potter v. Saginaw St. R.*, 83 Mich. 285; *Tracy v. Troy & L. R.*, 54 Hun, 550; *Ogden City R. v. Ogden City*, 7 Utah, 207.

⁴ *Pelton v. East Cleveland R.*, 22 W'kly Bull. 67.

⁵ 14 Ohio St. 523. See § 402.

⁶ *Heilman v. Lebanon, etc. R.*, 145 Pa. 23.

⁷ See § 407.

evant to such use.¹ It has been urged that the electric current in common use is dangerous to life and property, but courts have declined to accept this as an established fact in view of the evidence presented.² The claim that the electric current causes a deterioration in the general telephone service has been noticed elsewhere,³ and an allegation of injury to a particular telephone has been dismissed, as it appeared that the detriment existed before the construction of the railway.⁴

§ 404. **Elevated Railroads.**— By an elevated railroad we mean a road raised above the street and used for the transportation of passengers from station to station, instead of from point to point along the street, as in the case of ordinary street railroads. The legal history of these roads in the city of New York is, in respect to volume, probably unequalled in the annals of litigation. A synopsis will be sufficient for the present purpose. The roads in question are built upon an iron roadbed, supported by iron pillars planted in the roadway or at the curb. The cars are somewhat similar to those used on ordinary railroads, and are made up into trains, which are drawn by steam locomotives. The trains, which are chiefly intended for passenger traffic, are run at short intervals, and stop at regular stations. The statutes authorizing the companies to occupy the streets did not provide for compensation to the owners of abutting property, for it was assumed that the fee of the streets in question was in the public in respect to all thoroughfare uses, and the legislature intended to grant a clear right of way. The Court of Appeals decided, however, that the legislature had no power to grant the right of way in disregard of certain easements over the street which were declared to appertain to abutting property; that these easements were property and could not be taken without compensation.⁵

¹ *Taggart v. Newport St. R.*, 16 R. I. J. Eq. 380; *Pelton v. East Cleveland R.* 668; *Halsey v. Rapid Transit R.*, 47 N. 22 W'kly Bull. (Ohio) 67. See also *Nat'l J. Eq.* 380. But Judge Dillon says of *Tel. Co. v. Baker* (1893), 2 Ch. 186; this distinction that it is "so fine as to *Detroit City R. v. Mills*, 85 Mich. 634. be almost impalpable, and it suggests
² See § 80.
³ *Louisville Bagging Co. v. Cent. Pass. R., Louisville (Ky.) Court*, 1890.
⁴ *Story v. New York El. R.*, 90 N. Y. Corp. p. 893, note.
⁵ *Taggart v. Newport St. R.*, 16 R. I. 122.

668; *Halsey v. Rapid Transit R.*, 47 N.

The case was reargued and the original decision affirmed.¹ In both Story's and Lahr's cases the easements were based on contract, the streets in question having been opened under the Act of 1813. There were other streets occupied by the elevated railroads which dated back to the Dutch dominion, and had been declared to be owned absolutely by the State according to the rule of the civil law.² Still other streets were opened during the English colonial period. But the courts have declared that the easements defined in Story's case do not depend on contract, but affect every street without reference to its origin.³ It has been decided that the easement of access is affected by the dripping of oil and water from the structure;⁴ the easement of light by the structure itself,⁵ the stations,⁶ and the passing trains;⁷ the easement of air by smoke, gases, ashes, and cinders.⁸ The easements have been held to be unaffected by noise caused by the

¹ *Lahr v. Met. El. R.*, 104 N. Y. 268, in which Chief Justice Ruger stated the conclusions in Story's case as follows:

"1. That an elevated railroad in the streets of a city operated by steam power and constructed as to form, equipment, and dimensions like that described in the Story case, is a perversion of the use of a street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction without providing compensation for the injury inflicted upon abutting owners.

"2. That abutters upon a public street claiming title to their premises by grant from municipal authorities, which contains a covenant that a street to be laid out in front of such property shall forever thereafter continue for the free and common passage of and as public streets and ways for the inhabitants of said city, . . . acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage of light and air through and over said street for the benefit of property situated thereon.

"3. That the ownership of such easement is an interest in real estate constituting property within the meaning of

that term as used in the constitution of the State, and requires compensation to be made therefor before it can lawfully be taken from its owner for public use.

"4. That the erection of an elevated railroad the use of which is intended to be permanent in a public street, and upon which cars are propelled by steam-engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

² *Dunham v. Williams*, 37 N. Y. 250.

³ *Abendroth v. Manhattan R.*, 122 N. Y. 1.

⁴ *Drucker v. Manhattan R.*, 106 N. Y. 157.

⁵ *Drucker v. Manhattan R.*, 106 N. Y. 157.

⁶ *Storck v. Met. El. R.*, 131 N. Y. 514.

⁷ *Drucker v. Manhattan R.*, 106 N. Y. 157.

⁸ *Drucker v. Manhattan R.*, 106 N. Y. 157.

operation of the railroad,¹ by invasion of privacy,² by obstruction of the full view of premises from the opposite side of the street.³ The laws incorporating elevated railway companies in New Jersey recognize private interests in streets, and prescribe compensation for their invasion.⁴

§ 405. **Steam Railroads.** — When we speak of a steam railroad we refer usually to a road built for the general transportation of passengers and freight. The construction of such a railroad upon a street, the fee of which is private, is usually held to impose an additional servitude for which the owner must be compensated. This is so, chiefly for the reason that the occupation of the railroad is practically exclusive, both on account of the character of the roadbed and the speed of the trains.⁵

Where the fee of a street is in the public it has been decided that a railroad can be constructed without compensation to the abutter, as such damage as may result to his property is purely consequential and not within the purview of the eminent domain.⁶ According to some authorities this rule should not be applied where the construction of the railroad actually prevents access to the adjoining land.⁷ Thus, in *Egerer v. New York Central & Hudson River Railroad Company*,⁸ it was held that where a railroad was so built that access to abutting land with

¹ *Am. Bank Note Co. v. New York El. R.*, 129 N. Y. 252; *Bischoff v. New York El. R.*, 138 N. Y. 257.

² *Messenger v. Manhattan R.*, 129 N. Y. 502.

³ *Messenger v. Manhattan R.*, 129 N. Y. 502.

⁴ *Sullivan v. North Hudson County R.*, 51 N. J. L. 518.

⁵ *Williams v. New York Cent. R.*, 16 N. Y. 97; *Henderson v. New York Cent. & H. R. R.*, 78 N. Y. 423; *Lawrence R. v. Williams*, 35 Ohio St. 168; *Imlay v. Union Branch R.*, 26 Conn. 249; *Reichert v. St. Louis & S. F. R.*, 51 Ark. 491; *Weyl v. Sonoma Val. R.*, 69 Cal. 202; *Sherman v. Milwaukee, L. S. & W. R.*, 40 Wis. 645; *Starr v. Camden & A. R.*, 24 N. J. L. 592; *Kucheman v. Chicago, C. & D. R.*, 46 Iowa, 366; *Theobald v. Louisville, N. O. & T. R.*, 66 Miss. 279; *Chicago, K. & W. R. v. Woodward*, 47

Kan. 191; *Indianapolis, B. & W. R. v. Hartley*, 67 Ill. 439; *West. R. v. Alabama G. T. R.*, 96 Ala. 272; *Hodges v. Seaboard & R. R.*, 88 Va. 653. See also *Citizens' Coach Co. v. Camden Horse R.*, 33 N. J. Eq. 267; *Florida South. R. v. Brown*, 23 Fla. 104; *Wead v. St. Johnsbury & L. C. R.*, 64 Vt. 52. See *Pierce v. Drew*, 136 Mass. 75, *Allen, J.*; *Railroad Co. v. Bingham*, 87 Tenn. 522.

⁶ *Drake v. Hudson River R.*, 7 Barb. 508; *Fobes v. Rome, W. & O. R.*, 121 N. Y. 505; *Clinton v. Cedar Rapids & M. R. R.*, 24 Iowa, 455; *Hill v. Chicago, etc. R.*, 38 La. An. 599; *Ottawa, O. C., etc. R. v. Larson*, 40 Kan. 301; *Gaus v. St. Louis, K. & N. R.*, 113 Mo. 308.

⁷ *Reining v. New York, L. & W. R.*, 128 N. Y. 157. See *Houston & T. C. R. v. Odum*, 53 Tex. 343.

⁸ 130 N. Y. 108.

team and wagon was made impossible there was a taking of the abutter's property, — his easement of access. An earlier case¹ was distinguished, because it appeared that access was not obstructed, but merely made less convenient. But, in other cases, the fact that the fee of the street is in the public seems to preclude the existence of any valuable rights in the abutter. Thus, it has been held that although the construction of a railroad bridge in a street practically destroys access to adjacent property, the owner is without redress.²

The general conclusion that a steam railroad in a street does not work a legal injury to adjoining property is reached in another group of decisions, in which the interest of the public in the street, though not technically a fee, is assumed to be sufficiently broad to exclude any private interest in respect to the thoroughfare uses to which the street may be put.³ But this statement seems to be also qualified by the doctrine of *Egerer's Case*,⁴ that access cannot be wholly cut off.⁵

§ 406. In still other decisions the nature of the public interest in the street is deemed immaterial, as a private easement is held to appertain to the abutting land.⁶ If the abutter can show that this easement is affected he may have redress.⁷

The fee of the street may be private and yet not in the complainant. It has been held that where the abutter's lot is bounded by the side line of the street compensation cannot be recovered for the construction of a railroad.⁸ So, compensation

¹ *Fobes v. Rome, W. & O. R.*, 121 N. Y. 505. In *Lamm v. Chicago, S. P. & R.*, 45 Minn. 71, the *Fobes* case is dis-

approved as being inconsistent with the principle of the *Elevated Railway Cases*.

² *Slatten v. Des Moines Val. R.*, 29 Iowa, 148.

³ *Philadelphia & T. R.*, 6 Whart. 25. See *Richardson v. Vermont Cent. R.*, 25 Vt. 465; *Yates v. West Grafton*, 34 W. Va. 783; *Arbens v. Wheeling & H. R.*, 33 W. Va. 1; *Perry v. New Orleans, M. & C. R.*, 55 Ala. 413.

⁴ 130 N. Y. 108.

⁵ See *Faust v. Passenger R.*, 3 Phila. 164; *Brainard v. Missisquoi R.*, 48 Vt.

107; *Yates v. West Grafton*, 34 W. Va. 783.

⁶ See § 416.

⁷ *Adams v. Chicago, B. & N. R.*, 39 Minn. 286; *McQuaid v. Portland & V. R.*, 18 Or. 237; *Phipps v. West. Maryland R.*, 66 Md. 319; *O'Brien v. Baltimore Belt R.*, 74 Md. 363; *Fulton v. Short Route R.*, 85 Ky. 640; *Louisville & N. O. R. v. Orr*, 91 Ky. 109; *Indiana, B. & W. R. v. Eberle*, 110 Ind. 542. See also *Onset St. R. v. County Comm.*, 154 Mass. 395.

⁸ *Grand Rapids & I. R. v. Heisel*, 38 Mich. 62; *Clark v. Rochester, etc. R.*, 18 N. Y. St. R., 903; *Railroad Co. v.*

has been refused where the abutter owns to the centre of the street and a railroad is built upon the further side.¹ On the other hand it has been said that although the complainant cannot show title to the soil upon which the railroad is placed, he may recover if he can prove special injury to his lot.² But it has been held that the diversion of travel to the hither side of the street, due to the construction of a railroad upon the further side, does not necessarily impair access.³

The constitutional and statutory declarations in respect to damaging or injuriously affecting property for public use usually impose a liability upon corporations constructing railroads in streets.⁴

§ 407. **Telegraph and Telephone Lines.** — Where statutes incorporating telegraph or telephone companies permit the erection of the necessary plant upon highways, the fee of which is private, there is a difference of opinion as to whether the owner is entitled to compensation. The prevailing opinion seems to be that the plant is an additional servitude.⁵ But it has been held, on the other hand, that, as the telegraph and telephone are simply improved methods of communication, they are consistent with the highway easement for which the land was originally acquired.⁶ Where the fee of the street is in the public it has been held that an abutter cannot have compensation merely because a telephone pole is placed opposite his land, but must show special damage.⁷

Bingham, 87 Tenn. 522. See Fanning v. Osborne, 102 N. Y. 441.

¹ Heiss v. Milwaukee & L. W. R., 69 Wis. 555; Trustees, etc. v. Milwaukee & L. W. R., 77 Wis. 158; Sinnott v. Chicago & N. R., 81 Wis. 95; Florida South. R. v. Brown, 23 Fla. 104. See also Wager v. Troy Union R., 25 N. Y. 526.

² See Hogan v. Cent. Pacific R., 71 Cal. 83; Decker v. Evansville, S. & N. R., 33 N. E. Rep. 349 (Ind. 1893).

³ Indiana, B. & W. R. v. Eberle, 110 Ind. 542.

⁴ See §§ 153-157. But see Gaus v. St. Louis, K. & N. R., 113 Mo. 308.

⁵ West. Union Tel. Co. v. Williams, 86 Va. 696; Smith v. Cent., etc. Tel. Co.,

2 Ohio C. C. 259; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36; Stowers v. Postal Tel. Co., 68 Miss. 559; Pacific Postal Tel. Co. v. Irvine, 49 Fed. Rep. 113; Met. Tel. Co. v. Colwell Lead Co., 50 N. Y. Super. 488; Blashfield v. Empire State Tel. Co., 71 Hun, 532; Board of Trade Tel. v. Barnett, 107 Ill. 507; Broome v. New York & N. J. Tel., 42 N. J. Eq. 141. See Taggart v. Newport St. R., 16 R. I. 668; St. Louis v. West. Un. Tel. Co., 148 U. S. 92.

⁶ Pierce v. Drew, 136 Mass. 75. See also Julia Building Ass'n v. Bell Tel. Co., 88 Mo. 258; Gay v. Mut. Union Tel. Co., 12 Mo. App. 485. See Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32.

⁷ Irwin v. Gt. South. Tel., 37 La. An.

§ 408. **Works unrelated to the Thoroughfare Use.** — There appears to be no dissent from the proposition that any use of a street unrelated to the thoroughfare use, or the urban servitude, is a perversion of the purpose for which the land was acquired. Thus the state cannot freely authorize the use of a street as the site of a market,¹ a hack stand,² a watch-house,³ a ferry landing,⁴ a railroad station or freight-yard.⁵ But it has been held that compensation cannot be claimed on account of a horse-car left standing on the track to serve as a transfer station,⁶ nor for the erection of gates at a railroad crossing.⁷

VACATION OF STREETS.

§ 409. A street is vacated when all public interest and control are surrendered, or a new and obstructive public use is substituted. Vacation means that the state has determined that the street in question is no longer a public necessity. Where the act of the public authorities is regular on its face it cannot be impugned by an abutting owner, for a private person cannot compel the maintenance of a public work.⁸ Thus, although a common result of vacation is the revival of private ownership in the land, objection cannot be made that the street is vacated in order that this result may be attained.⁹

There is no difficulty in placing vacation on the list of public purposes. The public interests may be subserved as well by the abandonment of a work as by its institution. The vital question is whether vacation inflicts such an injury upon abutting property as will entitle its owner to compensation. Now a

63. See also *Hewett v. West*, Un. Tel., 4 Mackey (D. C.), 424.

¹ *State v. Laverack*, 34 N. J. L. 201; *State v. Mobile*, 5 Port. 279; *Lutterloh v. Cedar Keys*, 15 Fla. 306. See *Higgins v. Princeton*, 8 N. J. Eq. 309; *Elwood v. Bullock*, 6 Q. B. 383; *Herrick v. Cleveland*, 7 Ohio C. C. 470.

² *McCaffrey v. Smith*, 41 Hun, 117; *Branahan v. Hotel Co.*, 39 Ohio St. 333.

³ *Winchester v. Capron*, 63 N. H. 605.

⁴ *Prosser v. Wapello County*, 18 Iowa, 327. See also *Lexington, H. & P. Turnpike v. McMurtry*, 3 B. Mon. 516.

⁵ *Higbee v. Camden & A. R.*, 19 N. J.

Eq. 276; *Methodist Church v. Pennsylvania R.*, 48 N. J. Eq. 452; *Gahagan v. Boston & L. R.*, 1 Allen, 187; *Daly v. Georgia South. & F. R.*, 80 Ga. 793; *Lackland v. North Missouri R.*, 31 Mo. 180. See § 143.

⁶ *Bradshaw v. Citizens' St. Ry., Ind.* Super. Ct. 1888.

⁷ *Trustees, etc. v. Milwaukee & L. W. R.*, 77 Wis. 158. See also *Textor v. Baltimore & O. R.*, 59 Md. 540.

⁸ See § 217.

⁹ *Kean v. Elizabeth*, 54 N. J. L. 462; *Meyer v. Teutopolis*, 131 Ill. 552.

street is vacated in law when the public authorities abandon the highway easement, and thereby permit the revival of private ownership in the soil. A street, vacated in law, is not obstructed as far as the abutter is concerned where a private way over the land survives the public easement.¹ In such case the abutter cannot claim compensation on account of vacation. He has still an open way, and is, at most, inconvenienced by the cessation of public expenditure and control in respect to it. Where, however, it is held that upon vacation the land reverts unburdened with a private easement, so that the abutter cannot use it without trespassing,² the question whether the action of the authorities takes a property-right from the abutter is to be tried by the principles presently considered.

§ 410. The ability to go from one's land to a highway is deemed so essential to ownership that the common law prescribes that where one owning land, accessible by a single way, sells a part adjoining the way he shall be presumed to reserve a way of necessity over the part sold.³ Further, it has been shown that in many States one who is possessed of inaccessible land may condemn a way over adjacent land.⁴ These cases do not warrant, perhaps, the following proposition, but they give point to it. The public authorities cannot freely vacate a highway where the result of vacation is that an abutting owner cannot gain access to his land without trespassing. The right to access in its simplest form is property. Further, while it has been decided in some cases that the practical exercise of the right may be greatly embarrassed without paying compensation,⁵ the just doctrine which accords to an abutter the right to practicable access from his premises to the street usually prevails either by virtue of judicial rulings or by legislation.⁶ Is this right appurtenant to the whole frontage of the abutting tract?⁷ or is it respected

¹ *Stevens v. Shannon*, 6 Ohio C. C. 84 Mo. 351; *Kimball v. Kenosha*, 4 Wis. 142. See *State v. Snedeker*, 30 N. J. L. 321.

80; *Dodge v. Pennsylvania R.*, 43 N. J. Eq. 351; *Faust v. Passenger R.*, 3 Phila. 164; *Holloway v. Southmayd*, 139 N. Y. 390.

³ 3 Kent's Comm. 421.

⁴ See § 43.

⁵ See § 405.

⁶ See §§ 135, 155.

⁷ *Kings County Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *Bailey v. Culver*,

For the definition of a "tract," see §§ 189, 190.

though a part be cut off? In *Buccleuch v. Metropolitan Board of Works*,¹ the right of access to the river Thames was held to appertain to every foot of the adjacent land of the plaintiff, though access had been habitually gained at a single point only. This is a correct application of the rule. The rule in *Buccleuch v. Metropolitan Board of Works*² is also applicable where the tract in question abuts on more than one street. The deprivation of access to one street is an injury, although another street affords egress.³

§ 411. Where the tract in question does not abut upon the section of the highway vacated it is generally held that the owner is not deprived of property if, as is usually the case, he has access to the highway system in another direction.⁴ Thus, in *Coster v. Albany*,⁵ the removal of a bridge caused no injury to one whose land abutted on another section of the highway of which the bridge formed a part. Access was still obtainable by another though circuitous route. The same conclusion has been reached where compensation is prescribed for property "damaged" or "injuriously affected" for public use.⁶ But the more liberal opinion is that the fact that access may be had from another direction is not conclusive evidence that there is no legal injury to the property. If a convenient way be cut off, leaving only a decidedly inconvenient one, the abutting owner may have compensation. It has recently been decided that where the closing of a street will compel an abutting owner to take a roundabout way to the business centre of the town he should receive com-

¹ L. R. 5 H. L. 418.

² L. R. 5 H. L. 418.

³ *Fort Scott, W. & W. R. v. Fox*, 42 Kan. 490. See also *Stevens v. New York El. R.*, 130 N. Y. 95.

⁴ *Smith v. Boston*, 7 Cush. 254; *Davis v. County Comm.*, 153 Mass. 218; *Hammond v. County Comm.*, 154 Mass. 509; *Stanwood v. Malden*, 157 Mass. 17; *Kean v. Elizabeth*, 54 N. J. L. 462; *Fairchild v. St. Louis*, 97 Mo. 85; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Fearing v. Irwin*, 55 N. Y. 486; *King's County Fire Ins. Co. v. Stevens*, 101 N. Y. 411; *Paul v. Carver*,

24 Pa. 207; *Gerhard v. Comm.*, 15 R. L. 334; *Rochette v. Chicago, M. & S. P. R.*, 32 Minn. 201; *Montreal v. Drummond*, 1 App. Cas. 384. See also *Dodge v. Pennsylvania R.*, 43 N. J. Eq. 351; *Matter of Concord*, 50 N. H. 530; *Egerer v. New York Cent. & H. R. R.*, 130 N. Y. 108; *Castle v. Berkshire*, 11 Gray, 26; *Zettel v. West Bend*, 79 Wis. 316; *Lorenzen v. Preston*, 53 Iowa, 580.

⁵ 43 N. Y. 399.

⁶ *Chicago v. Union Building Ass'n*, 102 Ill. 379; *McGee's Appeal*, 114 Pa. 470. See also *East St. Louis v. O'Flynn*, 119 Ill. 200.

pensation.¹ In *Caledonian Railway Company v. Walker's Trustees*,² property fronting on a street was held to be injuriously affected by the obstructive use of a neighboring section of the street by a railway company, so that access to a near thoroughfare, formerly easy and direct, was rendered difficult and circuitous.³

GENERAL CONCLUSIONS.

§ 412. The leading decisions upon state control over streets as it affects private property have been cited, with such immediate comment as seemed necessary to their proper presentation. In some respects this body of law is inharmonious. The decisions, taken as a whole, do not present a governing principle which will in every event solve the practical question, — Does a particular use or improvement of a street effect a taking of private property? The decisions are sometimes pronounced by a divided court, or artificially reconciled with previous decisions. Quite often they are opposed to decisions of courts of equal rank in other States. Some of the decisions are subject to the sharper criticism that they disclose the weaknesses and inconsistencies which result from an attempt to sustain stable principles of law upon the unstable foundations of applied mechanics and progressive municipal needs. The conclusions are frequently sound on any hypothesis, but an hypothesis which will ensure just conclusions in every case has not been always adopted. Yet there should be a legal concept of a street and its uses so broad, so simple, that it shall not fail before any scheme of improvement, no matter how novel.

§ 413. **Urban and Rural Servitudes.** — A distinction has been drawn between a city street and a country road, — an urban and a rural servitude, — the street being subject to uses growing out of the needs of an urban community, uses which do not bear the same important relation to the welfare of a rural community.⁴

¹ *Gargan v. Louisville, N. A. & C. R.*, 89 Ky. 212. 72; *Sterling's Appeal*, 111 Pa. 35; *Heilman v. Lebanon R.*, 145 Pa. 23;

² 7 App. Cas. 259.

³ See also *Brakken v. Minneapolis & S. L. R.*, 29 Minn. 41. See *Stanwood v. Malden*, 157 Mass. 17. *People v. Kerr*, 27 N. Y. 188; *Bloomfield, etc. Gas Light Co. v. Calkins*, 62 N. Y. 386; *Barney v. Keokuk*, 94 U. S. 324; *West. R. v. Alabama G. T. R.*, 96

⁴ See *Palatine v. Kreuger*, 121 Ill. Ala. 272.

An effect of the distinction is this: the public interest in a country road is simply an easement of passage, in a city street it is something greater, — the street may be freely used as a way for pipes and sewers. The distinction has been disapproved.¹

§ 414. *Anticipation of Future Use.* — A proposition often stated is that when land is condemned or dedicated for a highway the owner is presumed to anticipate certain improvements and uses of the way for which, when they materialize, he cannot obtain compensation. The principle involved is well established and sound,² and the proposition can be readily and fairly applied to many simple cases of highway use and improvement. But its application to the case of the modern street has caused not a little confusion and injustice. Laying aside constitutional and statutory declarations of liability for consequential injuries,³ we find the following anticipations imputed to one whose land is affected by a street easement. In every State except Ohio he anticipates that he may be obliged to enter his house by a second-story window when the grade is raised, or by a ladder when the grade is lowered. In New York he does not foresee any improved method of transportation from the horse-car to the electric motor; but in Pennsylvania he anticipates all methods. The Massachusetts man seems to be the only one who has clearly anticipated the telegraph and telephone. Judged by results there is no working rule of general application deducible from a presumed anticipation of future use.

§ 415. *Ownership of the Fee.* — In many decisions stress is laid upon the ownership of the fee of the street. Private rights are affirmed or denied as the fee is private or public. Where they are affirmed it is because the use in question is said to impose an additional burden on the fee. This distinction is not satisfactory. The technical distinction between a public fee and a public easement is nearly, if not quite, obliterated by decisions which lower the fee to a conditional fee,⁴ and other decisions which raise an indefinite and presumably perpetual

¹ *Floyd County v. Rome St. Ry.*, 77 Ga. 614. See also *People v. Law*, 34 Barb. 494; *Morris & E. R. v. Hudson Tunnel Co.*, 25 N. J. Eq. 384.

² See §§ 129, 163-164.

³ See §§ 153-157.

⁴ See §§ 206, 397.

easement to what is practically a conditional fee.¹ Further, the owner of land condemned for a street commonly receives its full value although the interest acquired is called an easement,² and has, in fact, no greater use of the surface of the street than one whose lot is bounded by the side line. These strong likenesses between a fee and an easement should not be overcome by the fact that the owner of the fee has a legal interest in the subsoil of the street, which, of course, the mere abutter does not possess. This interest is too insignificant to serve as a basis for the radical distinction expressed in the rule which allows compensation for a railroad in a street where the fee is private, but none where it is public.³

§ 416. **Easement by Adjacency.** — The best basis for determining the rights of an abutting owner is in the proposition that to each lot bounded by a street there appertains an easement by adjacency, without reference to the ownership of the soil of the street. This easement has been maintained in a number of well-reasoned opinions.⁴ Judge Cooley⁵ has defined this easement as "a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament legally attached to their (the abutters') contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner."⁶ An important distinction between a private estate in a street

¹ See § 207.

² See § 233.

³ See § 405.

⁴ *Story v. New York El. R.*, 90 N. Y. 122; *Lahr v. Met. El. R.*, 104 N. Y. 268; *Street Railway v. Cumminsville*, 14 Ohio St. 523; *Cohen v. Cleveland*, 43 Ohio St. 190; *Onset St. R. v. County Comm.*, 154 Mass. 395; *Haynes v. Thomas*, 7 Ind. 38; *Lostutter v. Aurora*, 126 Ind. 436; *Lexington & O. R. v. Applegate*, 8 Dana, 289; *Rude v. St. Louis*, 93 Mo. 408; *Gaus v. St. Louis, K. & N. R.*, 113 Mo. 308; *Adams v. Chicago, B. & N. R.*, 39 Minn. 286; *Lamm v. Chicago, S. P.*

etc. R., 45 Minn. 71; *Stone v. Fairbury, P. & N. R.*, 68 Ill. 394; *Dill v. Bd. of Education*, 47 N. J. Eq. 421; *Denver v. Bayer*, 7 Col. 113; *Omaha & R. V. R. v. Rogers*, 16 Neb. 117; *White v. Northwestern, &c. R.*, 113 N. C. 610; *Hatch v. Tacoma O., &c. R.*, 6 Wash. 1; *New York El. R. v. Fifth Nat'l Bank*, 135 U. S. 432; *Dooly Block v. Rapid Transit Co.*, 9 Utah, 31. See also *Barnett v. Johnson*, 15 N. J. Eq. 481.

⁵ Quoting in part from *Lexington & O. R. v. Applegate*, 8 Dana, 289.

⁶ *Grand Rapids & I. R. v. Heisel*, 38 Mich. 62.

based on ownership of the soil and the easement in question is this, that while the estate is bounded by the centre line, the easement covers the width of the street.¹ Hence, if one can prove that his easement of air is affected by the operation of a railroad upon the further side of the street he may recover.² It has been held that the easement extends only over that section of the street on which the lot in question abuts.³ This statement proves itself so far as the easements of light, air, and support are concerned. But the easement of access includes a way from the lot to the general highway system.⁴ Hence, for example, the obstruction of a *cul de sac* at any point affects the easements of access appertaining to the lots beyond.

To the question as to the right of an abutting owner to compensation for any use of a street beyond the common use this answer is suggested: The state holds all streets in trust for the people. It may improve them, authorize their use for purposes consistent with the trust, and vacate them. Such action need not be accompanied by compensation to the abutting owner unless it impairs what is usually, as against the public, his only valuable property in the street,—the private easements of access, light, air, and support, which alone modify the controlling interest of the state, whether that interest be termed a fee or an easement.

¹ *Lamm v. Chicago, St. Paul, etc. R.*,
45 Minn. 71.

² *Lamm v. Chicago, S. P., etc. R.*, 45
Minn. 71.

³ *Adams v. Chicago, B. & N. R.*, 39
Minn. 286.

⁴ See §§ 409–411.

CHAPTER XIV.

WATERS.

§ 417. The fact that under certain conditions, not uncommon, water is a menace to health and safety, and a drawback to the useful development of land, has provoked legislation directed to the amelioration of these evils. On the other hand, the law-making power has been no less exerted to secure a fuller utilization of water for ways of transportation, and for consumption, irrigation, and motive power than would be possible through the unaided efforts of private persons. Some of the law on this subject has been already considered, especially in defining property in water.¹ Much more might have been incorporated in preceding chapters were it not that the public interest in waters is so peculiar and complex that it can be best appreciated by grouping its various phases under a single head.

WATERWAYS.

§ 418. The public interest in ways by water is as great as in ways by land. The state may therefore authorize the condemnation of land for canals,² and where water is wholly private may condemn a public right of passage over it.³

But the waterways of a country are, usually, those natural ways which are comprised in the term *navigable waters*. The control of the state over these waters is based on sovereignty, not on proprietorship in the subjacent soil. It covers all waters

¹ See §§ 71-73, 78, 91, 92.

² *Binney v. Chesapeake & O. Canal*, 8 Pet. 201; *Hooker v. New Haven & N. Co.*, 15 Conn. 312; *Den v. Morris Canal*, 24 N. J. L. 587; *Haldeman v. Pennsylvania Cent. R.*, 50 Pa. 425; *Rogers v. Bradshaw*, 20 Johns. 735; *Townsend's*

Case, 39 N. Y. 171; *James River & K. Canal v. Anderson*, 12 Leigh, 278.

³ *Morgan v. King*, 35 N. Y. 454; *Olive v. State*, 86 Ala. 88. See also *White Deer Creek Imp. Co. v. Sassaman*, 67 Pa. 415; *Partridge v. Eaton*, 63 N. Y. 482.

commercially navigable,¹ though navigated in fact by pleasure-boats only,² and though the period of navigability is limited to regular seasons of flood.³ But a stream made floatable by the improvements of the owner does not become a public way unless a dedication can be shown.⁴

§ 419. In England the soil underlying public waters is in the crown as a part of the *jura regalia*.⁵ The dominion over the waters in the interest of navigation is in Parliament.⁶ It follows from this separation of interests that the crown may grant any use of the underlying soil, provided navigation be not impeded,⁷ while Parliament, dominating the crown as a sovereign dominates a proprietor, may conserve navigation by any method.⁸ In this country there is no such separation of interests. The president of the United States, the governors of the several States are simply the representatives of the executive power of the people. They have not even so much of personal sovereignty as was vouchsafed to English rulers in that striking assertion of parliamentary power,—the Act of Settlement. The rights of crown and Parliament as they obtained in this country before the Revolution are now vested in the people.⁹ The federal power over State and interstate waters is in no sense proprietary, but strictly sovereign. It is paramount to State rights, but is not self-executing. Therefore, until Congress have assumed jurisdiction over particular waters the States may control them without question.¹⁰

Private Rights in Navigable Waters.

§ 420. The state cannot authorize the use of private soil underlying a waterway for any purpose not connected with nav-

¹ *The Daniel Ball*, 10 Wall. 557; 278. See also *Nutter v. Gallagher*, 19 Rowe v. Granite Bridge, 21 Pick. 344. Or. 375; *Ward v. Warner*, 8 Mich. 508.

² *Atty.-Gen. v. Woods*, 108 Mass. 436.

See *Burroughs v. Whitwam*, 59 Mich. 279.

³ *The King v. Smith*, 2 Doug. 441.

⁴ *Colchester v. Brooke*, 7 Q. B. 339.

⁵ *Williams v. Wilcox*, 8 Ad. & EL 314.

⁶ *Morrison v. Coleman*, 87 Ala. 655; 314.

Thunder Bay Booming Co. v. Speechly,

31 Mich. 336; *Falls Man. Co. v. Oconto*

River Imp. Co., 58 N. W. 257 (Wis.

1894). See *Morgan v. King*, 35 N. Y. 454.

⁷ *The King v. Montague*, 4 B. & C. 598.

⁸ See *Lansing v. Smith*, 4 Wend. 9;

Langdon v. New York, 93 N. Y. 129;

Martin v. Waddell, 16 Pet. 367.

⁹ *Wadsworth v. Smith*, 2 Fairfield,

¹⁰ *Willson v. Black Bird Creek Co.*,

igation without making compensation to the owner. Thus, compensation must be paid for the site of a bridge pier.¹

Where the state wishes to free a navigable stream from an obstruction lawfully erected it must indemnify the owner of the obstruction. Thus, where one builds a dam by the state's permission he should receive compensation when it is necessary to destroy it in the interests of navigation.²

It appears that a private estate in land under a waterway, over which there is a public right of passage, is held subject to the right of the state to erect works in aid of navigation without compensation in respect to the land utilized.³

Where subaqueous soil is private property the owner is entitled to the reasonable use of the water, and may obtain compensation for its diversion to a canal,⁴ or other public use.⁵ But where a waterway is public the state may divert its waters without compensation to the riparian owner,⁶ or raise the water level without compensation to the riparian owner for the impairment of the use he has made of a water-power⁷ or a ford.⁸

§ 421. It may happen that land adjoining a waterway is damaged by the construction of works undertaken to improve navigation. If the damage is a flooding or other physical invasion of the land it is within the rule in *Pumpelly's Case*,⁹ and is therefore the subject of an action whether the actor is a private corporation,¹⁰ or the government.¹¹ So, if the course of a stream

² *Pet. 245*; *Gilman v. Philadelphia*, 3 Wall. 713; *County of Mobile v. Kimball*, 102 U. S. 691.

¹ *Morris Canal v. Jersey City*, 26 N. J. Eq. 294. See *Stockton v. Baltimore & N. Y. R.*, 32 Fed. Rep. 9; *Maxwell v. Bay City Bridge*, 41 Mich. 453.

² *Glover v. Powell*, 10 N. J. Eq. 211. See also *Ryan v. Brown*, 18 Mich. 196; *Allen v. Weber*, 80 Wis. 531.

³ *Hawkins Point Lighthouse*, 39 Fed. Rep. 77. See also *Scranton v. Wheeler*, 57 Fed. Rep. 803; *Philadelphia v. Scott*, 81 Pa. 80. See *Hill v. United States*, 149 U. S. 593.

⁴ *Walker v. Bd. of Public Works*, 16 Ohio, 540; *Avery v. Fox*, 1 Abb. C. C. 246.

⁵ See § 78.

⁶ *Rundle v. Delaware & R Canal*, 14 How. 80; *Comm. of Homochitto River v. Withers*, 29 Miss. 21; *People v. Canal Appraisers*, 33 N. Y. 461, affirming *Canal Appraisers v. People*, 17 Wend. 509, and distinguishing *Comm. v. Kempshall*, 26 Wend. 404; *Black River Imp. Co. v. La Crosse, etc. Co.*, 54 Wis. 659.

⁷ *Canal Appraisers v. People*, 17 Wend. 509.

⁸ *Zimmerman v. Union Canal*, 1 W. & S. 346.

⁹ See § 147.

¹⁰ *Thompson v. Androscoggin, etc. Co.*, 58 N. H. 108; *Pumpelly v. Green Bay Co.*, 13 Wall. 166. See also *Kaukauna Water Power Co. v. Green Bay & M. Canal*, 142 U. S. 254.

¹¹ *King v. United States*, 59 Fed. Rep.

be altered, the land needed for the new channel must be paid for.¹ But it has been held that the riparian owner cannot complain because the improvement of the waterway so deflects the current that his bank is injured,² or so raises the water level as to obstruct his drainage system.³

As the rights of riparian owners on navigable waters are to be enjoyed in subordination to the public right of navigation,⁴ it follows that the state may freely draw harbor lines beyond which wharves cannot be built,⁵ unless the line in question interferes with a wharf which has been lawfully built,⁶ or is drawn for a purpose other than that of conserving navigation.⁷

§ 422. The cases cited thus far have dealt chiefly with the rights of the riparian owner in respect to his land and the waters adjacent. A larger question is presented upon the assertion that an authorized interference with the freedom of the waterway impairs a private right of navigation.

It is well settled that one who is not a riparian owner, but is accustomed to navigate a waterway as one of the public, is not specially injured by an authorized obstruction of the way,⁸ or by the imposition of reasonable tolls by persons authorized to thus reimburse themselves for expenses incurred in improving navigation.⁹

Has a riparian owner an interest in navigation superior to that of the public at large? It is plain that one who has not even a riparian right of access¹⁰ has not a special right of navi-

9; *Sweeney v. United States*, 62 Wis. 396; *Zemlock v. United States*, 73 Wis. 363. *Prosser v. North. Pacific R.* 152 U. S. 59.

¹ *Carson v. Coleman*, 11 N. J. Eq. 106. See also *Spring v. Russell*, 7 Me. 273. ⁵ *Yates v. Milwaukee*, 10 Wall. 497. See *Harbor Line Comm. v. State*, 2 Wash. 530.

² *Hollister v. Union Co.*, 9 Conn. 436; *Brooks v. Cedar Brook Imp. Co.*, 82 Me. 17; *Green v. Swift*, 47 Cal. 536; *Green v. State*, 73 Cal. 29. ⁷ *Farist Steel Co. v. Bridgeport*, 60 Conn. 278.

³ *Mills v. United States*, 46 Fed. Rep. 738. ⁸ *Willson v. Black Bird Creek Co.*, 2 Pet. 245; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Flanagan v. Philadelphia*, 42 Pa. 219; *The King v. Montague*, 4 B. & C. 598.

⁴ See § 91. ⁹ *Huse v. Glover*, 119 U. S. 543.

⁵ *Commonwealth v. Alger*, 7 Cush. 53; *State v. Sargent*, 45 Conn. 358; ¹⁰ See § 92.

gation;¹ and it has been held, further, that he cannot question the lawfulness of an obstruction, but must leave this to the state.² A riparian owner who has a right of immediate access to the waterway, either through the riparian right or by virtue of his ownership of the subaqueous soil, is specially damaged, of course, by an obstruction in front of his land.³ Does this right to get to the way carry with it the right to travel *along* the way? The riparian owner cannot complain because navigation is restricted or made less convenient by the action of the state or its authorized agent.⁴ Thus he is not specially injured by the building of a bridge in such a manner as to prevent the passage of masted vessels.⁵ But does a riparian owner suffer a legal injury by the absolute closing of navigation? It has been intimated that a private right of navigation attaches to the riparian right.⁶ In *Bell v. Quebec*⁷ it was argued that the opinion in *Lyon v. Fishmonger's Co.*⁸ approved this proposition, but the Privy Council did not so interpret it. In other cases courts have decided, apparently without reference to a riparian right of immediate access, that the state may close a navigable stream without compensating the riparian owner.⁹ The question whether the right of access includes a right of navigation is, though seldom raised, one of great importance in point of law. A possible similarity between rights of access to a street and a waterway at once suggests itself. That there is a similarity in some respects is clear.¹⁰ Indeed it may be assumed that, allowing for the difference between physical conditions, the rights are substantially alike up to the very point in question,—the closing.

¹ *Davidson v. Boston & M. R.*, 3 Cush. 91; *Thayer v. New Bedford*, 125 Mass. 253.

² *Blackwell v. Old Colony R.*, 122 Mass. 1.

³ *Maxwell v. Bay City Bridge*, 46 Mich. 278. See §§ 91, 92.

⁴ *Miller v. New York*, 109 U. S. 385; *Lansing v. Smith*, 4 Wend. 9; *Parker v. Cutler Co.*, 20 Me. 353; *Jarvis v. Santa Clara Val. R.*, 52 Cal. 438; *Atty.-Gen. v. Conservators of Thames*, 1 H. & M. 1.

⁵ *Gilman v. Philadelphia*, 3 Wall. 713; *Bell v. Quebec*, 5 App. Cas. 84.

⁶ *Hickok v. Hine*, 23 Ohio St. 523. See *Backus v. Detroit*, 49 Mich. 110.

⁷ 5 App. Cas. 84.

⁸ 1 App. Cas. 662.

⁹ *Clark v. Saybrook*, 21 Conn. 313; *Bailey v. Philadelphia, W. & B. R.*, 4 Harr. (Del.) 389; *Swanson v. Mississippi & R. R. Boom Co.*, 42 Minn. 532.

¹⁰ See *Bell v. Quebec*, 5 App. Cas. 84; *Colchester v. Brooke*, 7 Q. B. 339; *Van Dolsen v. New York*, 17 Fed. Rep. 817; *Kane v. New York El. R.*, 125 N. Y.

of the thoroughfare. At this point, however, it seems that the radical difference between a road and a river compels the conclusion that, while the road cannot be freely closed against an abutter unless another way remains,¹ the river may be closed without compensation to riparian owners. A road is laid out or adopted by the state, and it may well be presumed that it is intended to afford access to abutting property. As a river is created by natural forces its origin cannot be coupled with any presumed intention with reference to riparian owners. The riparian right of access does not appear to contain a covenant that there shall always be a public way; it simply enables the riparian owner to avail himself of a public way as long as it exists. His rights *along* the way are but those of the public at large. They are surrendered whenever the public interest in the maintenance of the way is outweighed by the public interest in its closure.

USE OF WATER.

§ 423. The power to condemn a water-supply for communal uses, both public and domestic, is recognized everywhere, and frequently exercised.²

In countries where there are large tracts of arid land, public powers have been exerted in order to secure their proper irrigation.³ Where the necessities of the work require the use of private property it may be condemned.⁴ The water itself may be condemned,⁵ and also land needed for canals.⁶

Where it is necessary to use water in order to construct or maintain a public work it may be condemned. Thus, a railroad company may be authorized to condemn water necessary for the operation of their road.⁷

¹ See §§ 410, 411.

² *Riche v. Bar Harbor Water Co.*, 75 Me. 91; *Lumbard v. Stearns*, 4 Cush. 60; *Village of Middletown*, 82 N. Y. 196; *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528; *Olmsted v. Morris Aqueduct Co.*, 46 N. J. L. 495; s. c. 47 N. J. L. 311; *Warner v. Gunnison*, 31 Pac. Rep. 238.

³ See W. E. Hall, *Irrigation Development in France, Italy, and Spain*,

Report of State Engineer of California, 1886.

⁴ See § 39, n. 4.

⁵ *Lux v. Haggin*, 69 Cal. 255; *Umatilla Co. v. Barnhart*, 22 Or. 389. See also *Irrigation Co. v. Vivian*, 74 Tex. 170.

⁶ *Tripp v. Overocker*, 7 Col. 72; *Sand Creek Co. v. Davis*, 17 Col. 326; *Lindsay Irrigation Co. v. Mehrtens*, 97 Cal. 676; *Oury v. Goodwin*, 26 Pac. Rep. 376 (Ariz.).

⁷ *Strohecker v. Alabama & C. R.*, 42

§ 424. **Motive Power.** — In certain States laws have been passed empowering individuals or corporations to subject private property to servitudes in favor of works designed to create water power. These laws are usually termed mill or flowage acts. In a few instances they permit an actual expropriation of land. Thus, the right has been given to condemn land for a mill-site and dam.¹ But as a rule a mill act does not contemplate a direct occupation of land, but the right to flood it by means of a dam erected upon one's own property. The power created is in some instances to be used for a single mill, usually a grist-mill.

A use of later origin is the supplying of power to mills of divers kinds. The comparative breadth of the latter use, leading as it has frequently done to the establishment of prosperous towns, has suggested the view that it is a fit object for the eminent domain, while the single grist-mill is not. But is this distinction reasonable? Is not a grist-mill in a country newly settled quite as important a feature as a group of factories in a later stage of its development? There is, however, an important difference between these mill acts in this that, while in some cases the beneficiaries may be compelled to serve all comers at equal rates, they are frequently allowed to conduct their business in all respects as a private concern. It is in respect to acts of the latter sort that the constitutional question as to publicity of use has been raised.² It is to avoid the question that eminent jurists have based these acts on another doctrine than the eminent domain. Chief-Justice Shaw has defined a flowage act as "a provision by law for regulating the rights of proprietors on the same stream,"³ and in another opinion has sharply distinguished it from an exercise of the eminent domain.⁴ But the general conclusion of law that flooding land is *taking* it,⁵ and the accepted prohibition that property cannot be taken save

Ga. 509. See also *Pennsylvania R. v. Miller*, 112 Pa. 34.

¹ *Hankins v. Lawrence*, 8 Blackf. 266.

² See § 52.

³ *Bates v. Weymouth Iron Co.*, 8 Cush. 548.

⁴ *Murdock v. Stickney*, 8 Cush. 113.

See also *Head v. Amoskeag Co.*, 113 U. S. 9; *Lowell v. Boston*, 111 Mass. 454; *Turner v. Nye*, 154 Mass. 579; Judge Redfield's note, 12 Am. Law Reg.

x, s. 496.

⁵ See § 148.

for the public use,¹ seem to force the conclusion that if the mill acts are to be sustained on any ground save ancient custom,² they must be backed by the eminent domain. This conclusion is frankly accepted in many decisions which hold that the acts further public purposes.³

In certain States the strict rule obtains that a mill which is not open to all customers at reasonable rates cannot be aided by the eminent domain.⁴

The Constitution of Colorado⁵ permits the legislature to authorize the condemnation of a right of way for the conveyance of water in order to furnish power for an electric light plant.⁶

DRAINAGE AND PROTECTION.

§ 425. The improvement of low lands by draining off water, or preventing its inflow, has been the subject of much legislation. The question whether there is such an appropriation to public use as to justify the eminent domain is in some respects difficult, and is not free from the vexation of judicial disagreement. It will be convenient to classify the cases according to the relation which the land in question bears to the work, — that is to say, whether the land is subjected to a servitude for the benefit of other land, or is itself the object of improvement.

§ 426. *Drains.* — We have seen that while the common law and civil law disagree as to the rights of adjoining proprietors in the matter of natural drainage they agree in this, that one cannot artificially discharge water upon the land of his neighbor.⁷ This prohibition cannot be avoided by legislative permis-

¹ See § 39.

² See *Great Falls Man. Co. v. Fernald*, 47 N. H. 444; *Jordan v. Woodward*, 40 Me. 317.

³ *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *Olmstead v. Camp*, 33 Conn. 532; *Venard v. Cross*, 8 Kan. 248; *Jordan v. Woodward*, 40 Me. 317; *Gt. Falls Man. Co. v. Fernald*, 47 N. H. 444. See also *Fisher v. Horicon, I. & M. Co.*, 10 Wis. 351; *Miller v. Troost*, 14 Minn.

365; *Burnham v. Thompson*, 35 Iowa, 421.

⁴ *Tyler v. Beacher*, 44 Vt. 648; *Barre Water Co.*, 62 Vt. 27; *Moore v. Rice*, 34 Ala. 311. See also *Ryerson v. Brown*, 35 Mich. 333; *Varner v. Martin*, 21 W. Va. 534; *Beekman v. Saratoga & S. R.*, 3 Paige, 45; *Hay v. Cohoes Co.*, 3 Barb. 42; *Weismer v. Douglas*, 4 Hud. 201.

⁵ See § 39, n. 4.

⁶ *Lamborn v. Bell*, 18 Col. 346.

⁷ See § 146.

sion. Statutes permitting a drainage servitude to be imposed on land for the mere benefit of an individual proprietor have been pronounced invalid as being of private purpose,¹ unless legitimated by the constitution.²

Wherever an undertaking is of sufficient public concern to warrant the exercise of the eminent domain in behalf of its construction, the power may be exerted to secure its preservation.³ Therefore, while the proprietors of a public work are, as regards their neighbors, on a private footing in respect to natural drainage,⁴ they may be authorized in some cases in virtue of their public character to artificially discharge water upon private property, provided they make compensation.⁵

It has been asserted that the preservation of the general health is presumably of such concern to each individual that a drain or sewer for this purpose may be laid by virtue of the power of police without compensation for the land appropriated.⁶ But in *Cheesebrough's Case*⁷ an act authorizing a system of urban drainage in the interest of public health, without providing for compensation for lands subjected to the servitude of drains, was declared unconstitutional. The court declared that the permanent use of private property for such a purpose could be obtained only by the eminent domain.⁸

§ 427. **Reclamation.** — There is no such thing as a natural nuisance at common law in the sense that a personal liability can be based on its existence. A nuisance can be created only by a human fault either of omission or commission. Further, the fault must be imputable to the person charged with maintaining the nuisance. It follows that an owner of low land is under no obligation to improve it, though its reclamation would materially

¹ *Fleming v. Hull*, 73 Iowa, 598; *Reeves v. Wood County*, 8 Ohio St. 333; *McQuillen v. Hatton*, 42 Ohio St. 202; *Jenal v. Green Island Co.*, 12 Neb. 163. See also *Anderson v. Kerns Draining Co.*, 14 Ind. 199. But see *Seeley v. Sebastian*, 4 Or. 25; *Sherman v. Tobey*, 3 Allen, 7; *French v. White*, 24 Conn. 170.

² See § 39, n. 4.

³ See § 116.

⁴ See § 149.

⁵ *Heick v. Voight*, 110 Ind. 279. See also *Bates v. Westborough*, 151 Mass. 174; *Ward v. Peck*, 49 N. J. L. 42.

⁶ See *Donnelly v. Decker*, 58 Wis. 461.

⁷ 78 N. Y. 232.

⁸ See also *Matter of the Church of the Holy Sepulchre*, 61 How. Pr. 315.

benefit his neighbor or the public.¹ But there is no nuisance, natural or otherwise, beyond the reach of the law. If the source of the nuisance is essentially noxious it may be abated by the police power.² Thus, a stagnant pool may be drained without compensation to him upon whose land it happens to lie.³ The position of the owner of low lands at the common law being defined, we are ready to determine the methods by which the state may provide for their reclamation without his consent. Reclamation acts may be divided into three classes according to the object of legislative interference. These objects are the public health, the promotion of agriculture, and protection from flood. This classification is not necessarily alternative. Indeed, these objects frequently co-exist, and the first two are usually present in every scheme of reclamation. The function of the eminent domain in the matter of reclamation is, usually, comparatively insignificant. The quantity of land needed for dikes, ditches, and other works is so small in comparison with the area reclaimed that the chief concern of the owners is the validity of the assessments imposed to defray the cost of improvement.

Reclamation in the interest of public health is evidently a proper object of the eminent domain.⁴

In some States the transformation of low uncultivable lands into arable lands is deemed of sufficient public interest to warrant its consummation without reference to the wishes of one whose property may be needed,⁵ and in others this action is expressly permitted by the terms of the constitutions.⁶ In other States the creation of cultivable lands is not deemed sufficiently urgent to justify the compulsory improvement of low lands, unless indeed the act contemplates the preservation of public health, to which the material advantages of reclamation will be deemed incidental.⁷

¹ *Rutherford's Case*, 72 Pa. 82; *Philadelphia v. Scott*, 81 Pa. 80; *Zigler v. Menges*, 121 Ind. 99.

² See § 12.

³ See *Cheesebrough's Case*, 78 N. Y. 232.

⁴ *Dingley v. Boston*, 100 Mass. 544. See also *Hartwell v. Armstrong*, 19 Barb. 166.

⁵ *Norfleet v. Cromwell*, 70 N. C. 634; *Rutherford v. Maynes*, 97 Pa. 78; *Coomes v. Burt*, 22 Pick. 422; *Talbot v. Hudson*, 16 Gray, 417.

⁶ See § 39, n. 4.

⁷ *Ryer's Case*, 72 N. Y. 1; *Kinnie v. Bare*, 68 Mich. 625. See also *Donnelly v. Decker*, 58 Wis. 461; *People v. Henion*, 64 Hun, 471.

§ 428. Reclamation acts are too numerous and diverse to be treated with particularity, but several illustrations will serve to indicate the function of the eminent domain. First: In *Dingley v. Boston*,¹ the court sustained an act which empowered the city to condemn the fee of a tract of insalubrious land, and reclaim it at the public charge. A later statute of the same State is of similar import, except that an owner is permitted to keep his land upon paying the cost of its improvement.² While the first statute may be strictly within the competency of the legislature it is not as just as the second, for it assumes that an owner cannot, or will not, retain his land by defraying the cost of reclamation. In *Sweet v. Rechel*,³ the court held that one purchasing a lot of land which the city had taken under the statute construed in the *Dingley Case* held a good title, although the city had never, in point of fact, paid the compensation. It was intimated that these statutes expressed the police power, and that, therefore, compensation was not necessary,⁴ and the opinions mentioned were relied upon as supporting this view. A careful reading of these opinions does not show, it is submitted, that the court asserted a power to take the lands in question unfettered by a constitutional duty of making compensation, although the police power is of course duly recognized. Moreover, later decisions in Massachusetts recognize the eminent domain, or its equivalent, as the power behind these statutes so far as they contemplate the appropriation of land.⁵

Second: The state designates a tribunal before which a certain proportion of the owners of a tract of low land may apply for the reclamation of the whole, and the entire cost is assessed upon the land. The power behind legislation of this sort has been differentiated from the eminent domain and taxation, and likened to that branch of the police power by which the state regulates common interests in respect to contiguous tracts, as

¹ 100 Mass. 544.

² *Bancroft v. Cambridge*, 126 Mass. 438.

³ 37 Fed. Rep. 323.

⁴ See also *Donnelly v. Decker*, 58 Wis. 461.

⁵ See *Lowell v. Boston*, 111 Mass.

454; *Grace v. Board of Health*, 135 Mass. 490; *Cavanagh v. Boston*, 139

Mass. 426; *Moore v. Sanford*, 151 Mass.

285.

in the matter of party walls and fences.¹ This legislation has been based also upon inveterate usage.²

Third: The state authorizes a private corporation to undertake the reclamation of lands without the consent of the owners, and to recoup its expenses, and obtain a profit, by an assessment upon the property benefited. It has been held that it is within the power of the state to do this whenever the public interest will be promoted, but that the expenses must be apportioned according to the principles of special taxation, and in no case exceed the benefits conferred.³ But the legislature cannot empower a private corporation to undertake the reclamation of such portions of a designated territory as it may desire, without the co-operation of any of its owners or of public authorities, and defray the cost thereof, and earn dividends upon its capital stock, by imposing assessments not limited to benefits conferred. The object of the scheme is wholly private, being merely the pecuniary advantage of the incorporators, and hence cannot justify the exercise of the eminent domain or taxation in its behalf.⁴

§ 429. *Levees.* — While the owner of low land is under no common-law obligation to improve it,⁵ it seems that where the configuration of land is such that it is a barrier against a natural body of water, the owner may not destroy the barrier to the injury of other land.⁶ It has been suggested also that the riparian owner may be liable for the decay of the natural bank through permissive waste.⁷ Non-interference with a natural barrier may be enjoined by statute. Thus, the state, by virtue of its police power, may inhibit the owner of a sea-beach from removing stones therefrom.⁸ But one who lawfully constructs something which proves to be a barrier against incoming water

¹ *Wurts v. Hoagland*, 114 U. S. 606; *O'Reilly v. Kankakee Drainage Co.*, 32 Ind. 169. See also *Lowell v. Boston*, 111 Mass. 454; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518. But see *Talbot v. Hudson*, 16 Gray, 417; *Ryer's Case*, 72 N. Y. 1.

² *Hoagland v. Wurts*, 41 N. J. L. 175.

³ *Tide Water Co. v. Coster*, 18 N. J. Eq. 518.

⁴ *Kean v. Driggs Drainage Co.*, 45 N. J. L. 91.

⁵ See § 427.

⁶ *Anderson v. Henderson*, 124 Ill. 164.

⁷ See *Commonwealth v. Alger*, 7 Cush. 53; *Philadelphia v. Scott*, 81 Pa. 80.

⁸ *Commonwealth v. Tewkesbury*, 11 Met. 55.

is under no obligation to his neighbor to maintain it. Hence, it appears that the legislature cannot forbid a railroad company to remove an embankment because it happens to protect neighboring land.¹

Where riparian land is an insufficient barrier against the inflow of water the state may exert its power to further the erection of suitable levees or dikes. The method by which the cost of the works is defrayed — usually by imposing an assessment on a defined district — is not within our province. The question is: Must the eminent domain be exerted in order to impose the servitude upon the land? It appears that in Louisiana the riparian owners received their lands subject to a servitude in favor of protective works. Therefore, the levees in this State may be built without the eminent domain.² Where the bank is not held subject to the servitude of levees the land needed for levees must be paid for.³ Where land between high and low water marks belongs to the riparian owner, subject to the public right of navigation, a levee may be built upon it without compensation.⁴ A statute which permits one to secure the safety of his low lands by appealing to the public authorities, who may thereupon authorize the building of a levee on the land of another, has been declared unconstitutional, because the interest of the public does not sufficiently appear.⁵

According to the common law the owner of riparian land may protect it from the incursion of water by dikes or levees which do not divert or obstruct the normal flow. If this proper use of the land causes the flooding of other lands there is no liability.⁶ This rule has been applied where consequential injuries result from the construction of levees.⁷

¹ *Koch v. Delaware, L. & W. R.*, 54 N. J. L. 401.

⁴ *Philadelphia v. Scott*, 81 Pa. 80.

⁵ *Smith v. Atlantic & G. W. R.*, 25

² *Bass v. State*, 34 La. An. 494; *Ohio St.* 91.

Peart v. Meeker, 12 So. Rep. 490 (La. 1893); *Hart v. Levee Comm.*, 54 Fed. Rep. 559.

⁶ *The King v. Comm. of Sewers*, 8 B. & C. 355; *Shelbyville & B. Turnpike v. Green*, 99 Ind. 205.

³ *Horton v. Hoyt*, 11 Iowa, 496;

⁷ *Lamb v. Reclamation Dist.*, 73 Cal.

Richardson v. Levee Comm., 68 Miss.

125; *Hoard v. Des Moines*, 62 Iowa,

539. See *Lamb v. Reclamation Dist.*, 73

326.

Cal. 125.

FISHERIES.

§ 430. The right to fish in public waters belongs as a rule to the public at large. No one can be deprived arbitrarily of this right. Hence, a town cannot qualify the right by limiting the enjoyment thereof to its own inhabitants.¹ Where there is a private fishery in a public river it is subject to the public interest in navigation. Thus, where such a fishery is injured by the authorized construction of navigation works or a wharf the owner cannot recover compensation.² But if the fishery is affected by the construction of a railroad compensation must be paid.³

The public interest in the preservation and increase of an important article of food justifies the state in regulating and fostering fisheries. Where land upon innavigable waters was condemned in order to preserve an alewife fishery the owner was given compensation for the land only, as he held his fishery subject to the public right.⁴ A statute enabling one owning land upon a stream to flood the lands of others for the purpose of making a pond for fish culture has been upheld, not as a taking of property for public use, but upon the principle of the Mill Acts.⁵

It has been held that where one erects a dam, or other obstruction to the passage of fish, the state may compel him to provide a suitable fishway at his own expense. This for the reason that the public interest in the propagation of fish, for which their freedom of the streams is necessary, precludes the right of an individual to interfere unless such right is expressly accorded.⁶ In *Woolever v. Stewart*,⁷ it was held that a statute compelling owners of dams to construct fishways was unconstitutional in respect to a dam which had stood for twenty-one years. This conclusion was based on the ground that "if there

¹ *Hayden v. Noyes*, 5 Conn. 391.

² *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21; s. c. 90 Pa. 85.

³ *Alexandria & F. R. v. Faunce*, 31 Gratt. 761.

⁴ *Cole v. Eastham*, 133 Mass. 65.

⁵ *Turner v. Nye*, 154 Mass. 579.

⁶ *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500; *Comm. v. Holyoke Water Power Co.*, 104 Mass. 446; *Parker v. People*, 111 Ill. 581. But see *Commonwealth v. Pennsylvania Canal*, 66 Pa. 41; *People v. Platt*, 17 Johns. 195.

⁷ 36 Ohio St. 146.

was an obligation resting on the owner of the dam to keep a way open for the passage of fish to the waters above, it was for the benefit of the upper owners, and for them only." From this premise the conclusion naturally followed that the right to maintain the dam as built accrued by adverse user for the statutory period. But had the broad consideration of the public interest in the fish supply been duly appreciated, the assertion of a prescriptive right would have failed before the interests of the state.¹

One is not deprived of property by laws which fix the periods within which, and the means by which, fish may be taken.² Such laws are valid expressions of the power of police.

¹ See *Parker v. People*, 111 Ill. 581. *Collison*, 85 Mich. 105; *Lawton v.*

² *Weller v. Snover*, 42 N. J. L. 341; *Steele*, 152 U. S. 133.
People v. Bridges, 142 Ill. 30; *People v.*

NOTES OF RECENT CASES.

- § 15-a. The Supreme Court hold that a legislature may compel railroad corporations having repealable charters to so alter their road-beds as to do away with all crossings at grade. *New York & N. E. R. v. Bristol*, 151 U. S. 556.
- § 17-a. The legislature of Kentucky passed an act regulating the tolls on an interstate bridge. The Supreme Court declared the act invalid upon the broad ground that, as such a bridge is a way for interstate commerce, the regulation of its tolls is not within the competency of State legislatures. A minority of the Court approved the decision on the ground that the acts of Kentucky and Ohio under which the bridge was built created a contract between the States that would be broken were one State allowed to regulate tolls, but were of the opinion that until Congress assumed jurisdiction in the matter of rates the States were at liberty to regulate them. *Covington, etc. Bridge v. Kentucky*, 154 U. S. 204.
- § 26-a. In *Scott v. McNeal*, 154 U. S. 34, it is held that a statute authorizing the administration of the estates of persons supposed to be dead, after notice by publication, is void as to a living person, as it attempts to deprive him of property without due process of law.
- § 32-a. In *Luxton v. North River Bridge*, 153 U. S. 525, the Supreme Court decide that Congress may authorize the condemnation of land within a State for an interstate bridge.
- § 36-a. An objection to a Maryland condemnation statute that it did not provide for notice was dismissed by the Supreme Court on the ground that the State court of last resort had decided (*Baltimore Belt R. v. Baltzell*, 75 Md. 94; see § 338) that the act, properly construed, did provide for notice. *Baltimore Traction Co. v. Baltimore Belt R.*, 151 U. S. 137.
- § 37 a. In *Marchant v. Pennsylvania Railroad Co.*, 153 U. S. 380, the plaintiff urged that she had been denied the equal protection of the laws because the Supreme Court of Pennsylvania denied her suit on account of damage to her property abutting on Filbert Street caused by a railroad built on land abutting on the opposite side (see *Pennsylvania R. v. Marchant*, 119 Pa. 541; see § 156), while they sustained a suit brought by another abutter on the same street on account of

damage caused by the same railroad constructed in the street. See *Pennsylvania R. v. Duncan*, 111 Pa. 352; see § 155. The Supreme Court held that there had not been a deprivation of property without due process of law, as there had been a fair trial in due form, nor a denial of the equal protection of the laws, because the distinction between suitors was not invidious, but was based on a substantial difference between their positions.

§ 50-a. In *Matter of East River Bridge Company*, 75 Hun 119, the court, in setting aside a report of commissioners approving the construction of a bridge and elevated railway, laid some stress on the fact that the promoters did not show sufficient financial ability to meet the probable claims for compensation.

§ 51-a. The proposition that publicity of use is least questionable when the state itself attempts to condemn, suggests the question whether the state may undertake any business it pleases, for, as the state can act only in the public interest, it would seem to follow that any business within its competency would be a public use for which the eminent domain could be exerted if necessary. The right of the state or its political corporations to engage in business has been considered in several recent decisions. The most notable of these decisions is on the *South Carolina Dispensary Law*, which, in the language of the court, was intended to prohibit "the manufacture and sale of intoxicating liquor as a beverage within the limits of the State by any private individual," and to vest "the right to manufacture and sell such liquor in the State exclusively through certain designated officers and agents." The court decide that the State cannot engage in a trading enterprise, "not because there is no provision to that effect in the Constitution, but because it is utterly at variance with the very idea of constitutional government." *M'Cullough v. Brown*, 19 S. E. 458.

The Supreme Court of Massachusetts are of the opinion that the legislature cannot authorize a city to buy coal and wood in order to sell them to its inhabitants. Opinion of Justices, 155 Mass. 598, Holmes, J., dissenting.

A Minnesota statute authorized the State to construct and operate grain elevators. The court held that the police power to regulate a business — so well settled in the case of grain elevators — (see §§ 18-21) does not include the power to engage in the business. Irrespective of the police power the court conceded, but did not decide, that the State could engage in any business unless prohibited by the Constitution, but found this prohibition in the constitutional declaration that the State should not contract debts for or carry on works of internal improvement. *Rippe v. Becker*, 57 N. W. 331 (Minn. 1894).

As a municipal corporation may supply gas and water to its inhabitants (see §§ 41, 423), it may supply the electric light. Opinion of Justices, 155 Mass. 598; *Linn v. Chambersburg*, 28 A. 842 (Pa.

1894). But the right to supply electricity for heat and power has not been considered. See *Opinion of Justices*, 155 Mass. 598.

- § 71-*a*. In *Shiveley v. Bowlby*, 152 U. S. 1, the Supreme Court review the leading cases on the distinction between public and private waters.
- § 91-*a*. One possessed of a riparian right holds it in subordination to a public right to use the water, and is not prejudiced, therefore, by the diversion of water for public consumption. *Minneapolis Mill Co. v. Water Comm.*, 58 N. W. 83 (Minn. 1894).
- § 102-*a*. In Massachusetts there is no constitutional right to have the necessity for condemning specific property determined by a court or jury. The legislature may place the matter within the competency of those to whom it gives the power to condemn. *Lynch v. Brookline*, 37 N. E. 437 (Mass. 1894).
- § 113-*a*. An elevated railway cannot be built under the General Railroad Law of Pennsylvania. *Potts v. Quaker City El. R.*, 29 A. 108; *Commonwealth v. Northeastern El. R.*, 29 A. 111.
- § 115-*a*. The Court of Appeals of New York decide that a corporation does not lose its power to condemn property because it has broken a contract made with the owner; that although a street railway corporation agrees with an abutter not to use steam as a motive power, the owner cannot resist condemnation because the contract has been broken. The breach of contract merely gives a right of action. *Long Island R.*, 143 N. Y. 67.
- § 157-*a*. The Supreme Court of Illinois decide that property abutting on a street may be "damaged" by noise caused by a railroad built on land lying on the other side. *Chicago, M. & S. P. R. v. Darke*, 148 Ill. 226.
- § 169-*a*. In *Scovill v. McMahon*, 62 Conn. 378, the plaintiff's ancestor conveyed a tract of land upon the condition that it should be used always as a cemetery. After many years the legislature lawfully prohibited the further use of the land as a cemetery (see § 13), and authorized the municipal authorities to condemn it for a park. This was done, and the compensation was paid to the defendant. The plaintiff claimed the whole compensation, on the ground that the condition having been broken the land reverted, or at least a part of the compensation, on the ground that if the condition was not broken there remained in him a possibility of reverter for which he should receive value. Both claims were denied. The court held that the condemnation of the land did not work a forfeiture of the estate to the plaintiff's advantage; that assuming the condition to be a condition subsequent, the effect of the prohibitory act was to destroy the condition, and thereby vest the absolute title in the defendant; that the title being thus vested, there was no possibility of reverter upon which to base a claim for a share of the compensation.

- § 207-a. The condemnation of an easement in property adjacent to a street does not cover the owner's interest in the street. *Nat'l Docks, etc. R. v. United N. J. R.*, 28 A. 673 (N. J. 1894).
- § 229-a. It is held that the insolvency of a corporation does not necessarily preclude it from exercising the eminent domain. *Lester v. Ft. Worth & A. R.*, 26 S. W. 166 (Tex. 1894).
- § 282-a. In *Chicago & Northwestern Railroad Co. v. Chicago*, 148 Ill. 141, the court approve the principle that an owner is not responsible for costs reasonably incurred in a proceeding to condemn his property.
- § 359-a. A deposit of compensation with the clerk of a court without the knowledge of the court has been held not to be a deposit that will justify entry. *Nat'l Docks, etc. R. v. United N. J. R.*, 28 A. 673 (N. J. 1894).
- § 401-a. A city cannot so construct an open drainage-ditch in a street as to impair access to abutting property without compensating the owner thereof. *Houston v. Kleinecke*, 26 S. W. 250 (Tex. 1894).
- § 402-a. In *Taylor v. Bay City Railway Company*, 59 N. W. 447 (Mich. 1894), the court approve the proposition that an abutter cannot recover compensation because the construction of a street railway prevents the unloading of drays standing athwart the street.
- § 403-a. A turnpike company may be authorized to build and operate an electric railway on their right of way without compensating the owner of the fee. *Green v. City, etc. R.*, 28 A. 626 (Md. 1894).
- In *West Jersey Railroad Company v. Camden, G. & W. Railroad Company*, 29 A. 423 (N. J. 1894), Chancellor McGill, in dissolving a preliminary injunction restraining the construction of an electric railway in a street because a probable invasion of property rights did not appear, says, "I do not now deal with the future possibilities of the electric railway. It may readily be conceived that the greater motive power it possesses may some time induce an attempt to use the highways by trains of cars, or by rails and cars of such character and size as practically to work all evils of the steam railway, and that there will be inaugurated systems of through cars in furtherance of rapid transit between distant points, which will crowd and burden the street to the inconvenience and obstruction of its other uses, without any accommodation to the ordinary local use of the street, and thus the degree of incompatibility with the common use may be so raised that the courts will be obliged to distinguish between methods of use, and declare against some as creating an additional servitude on the land occupied by the highway. the crucial test for that distinction being whether the use contemplated is compatible with the purpose for which the common highway was originally designed. . . . Basing their conclusions upon the contemplation of the customary use of the electric street railway, the courts have regarded that, as operated by the trolley system, it is

not an additional burden upon the soil in the common highway. . . . But it is a work of supererogation at this time to treat this question as more than an unsettled and doubtful one. It is at least that."

§ 407-a. In *People v. Eaton*, 59 N. W. 144 (Mich. 1894), it is held that telegraph poles upon a highway do not impose an additional servitude.

§ 411-a. The Supreme Court of Michigan approve the rule that an abutter cannot have compensation because a street is closed so long as he has access in another direction. *Buhl v. Fort Street, etc. Depot Co.*, 98 Mich. 596.

The Supreme Court of Rhode Island hold that one abutting on a thoroughfare and owning the fee to the centre thereof, is entitled to compensation on the closing of the thoroughfare where the sole remaining access to his property is by a *cul de sac*. *Johnson v. Old Colony R.* 29 A. 594.

CONSTITUTIONAL PROVISIONS.

In several State Constitutions (California, Art. XV., Sect. 1; South Carolina, Art. VI.; Wisconsin, Art. IX.) eminent domain is employed with reference to the property of the State. These provisions are excluded from the following list in accordance with the narrower definition of the power approved in § 2.

UNITED STATES.

Fifth Amendment. . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment. . . . nor shall any State deprive any person of . . . property, without due process of law.

NOTE.—The relation of this Amendment to State eminent domain is considered at § 36.

ALABAMA.

Art. I, Sect. 24. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals. But private property shall not be taken for or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owners: *provided, however,* that the general assembly may, by law, secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner: *And provided,* that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations other than municipal, or for the benefit of any individual or association.

Art. XIII, Sect. 7. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The general assembly is hereby prohibited from depriving any person from an appeal from any preliminary assessment of damages against any such corporations or individuals, made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to law.

ARKANSAS.

Art. II, Sect. 22. The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor.

Sect. 23. The State's ancient right of eminent domain . . . is herein fully and expressly conceded; . . .

Art. XVII, Sect. 9. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.

CALIFORNIA.

Art. I, Sect. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

Art. XII, Sect. 8. The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals; . . .

Art. XIV, Sect. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; (Followed by pro-

visions respecting the fixing and collecting of water rates in counties, cities, and towns)

COLORADO.

Art. II, Sect. 14. That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes, or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes.

Sect. 15. That private property shall not be taken or damaged for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Art. XV., Sect. 3. The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; . . .

Art. XVI., Sect. 7. All persons and corporations shall have the right of way across public, private, and corporate lands for the construction of ditches, canals, and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

CONNECTICUT.

Art. I., Sect. 11. The property of no person shall be taken for public use without just compensation therefor.

DELAWARE.

Art. I., Sect. 3. . . . Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made.

FLORIDA.

Declaration of Rights, Sect. 12. . . . Nor shall private property be taken without just compensation.

Art. XVI, Sect. 28. The legislature may provide for the drainage of the land of one person over or through that of another, upon just compensation therefor to the owner of the land over which such drainage is had.

Sect. 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.

GEORGIA.

Art. I, Sect. 3, Par. 1. In case of necessity, private ways may be granted upon just compensation being first paid by the applicant. Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid.

IDAHO.

Art. I, Sect. 14. The necessary use of lands for the construction of reservoirs or storage basins for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, to convey water to the place of use, for any useful, beneficial, or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the State. Private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.

Art. XI, Sect. 8. The right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchise of incorporated companies and subjecting them to public use, the same as property of individuals; . . .

Art. XV. The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental, or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be, sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law. (Followed by several sections relating to the use of waters.)

ILLINOIS.

Art. II, Sect. 13. Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

Art. IV., Sect. 30. The general assembly may provide for establishing and opening roads and cartways, connected with a public road, for private or public use.

Sect. 31. The general assembly may pass laws permitting the owners of land to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby.

Art. XI, Sect. 14. The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity, the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.

INDIANA.

Art. I, Sect. 21. No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

IOWA.

Art. I, Sect. 18. Private property shall not be taken for public use without just compensation first being made, or secured, to be paid to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

KANSAS.

Art. XII, Sect. 4. No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation.

KENTUCKY.

Sect. 195. The Commonwealth, in the exercise of the right of eminent domain, shall have and retain the same powers to take the property and franchises of incorporated companies for public use which it has and retains to take the property of individuals. . . .

Sect. 211. No railroad corporation organized under the laws of any other State, or of the United States, and doing business, or proposing to do business, in this State, shall be entitled to the benefit of the right of eminent domain or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this Commonwealth.

Sect. 242. Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The general assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law.

LOUISIANA.

Art. 156. Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

MAINE.

Art. I, Sect. 21. Private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it.

MARYLAND.

Art. III., Sect. 40. The general assembly shall enact no law authorizing private property to be taken for public use without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.

MASSACHUSETTS.

Pt. I., Art. X. Each individual of the society has a right to be protected by it in the enjoyment of his . . . property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

MICHIGAN.

Art. XV., Sect. 9. The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law.

Sect. 15. Private property shall not be taken for public improvements in cities and villages without the consent of the owner, unless the compensation therefor shall first be determined by a jury of freeholders, and actually paid or secured in the manner provided by law.

Art. XVIII., Sect. 2. When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law: *provided* the foregoing provision shall in no case be construed to apply to the action of commissioners of highways in the official discharge of their duties as highway commissioners.

Sect. 14. The property of no person shall be taken for public use without just compensation therefor. Private roads may be opened in the manner to be prescribed by law; but, in every case, the necessity of the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of proceedings, shall be paid by the person or persons to be benefited.

MINNESOTA.

Art. I, Sect. 13. Private property shall not be taken for public use without just compensation therefor, first paid or secured.

Art. X., Sect. 4. Lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms.

MISSISSIPPI.

Sect. 17. Private property shall not be taken or damaged for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public.

Sect. 110. The legislature may provide, by general law, for condemning rights of way for private roads, where necessary for ingress and egress by the party applying, on due compensation being first made to the owner of the property; but such rights of way shall not be provided for incorporated cities and towns.

Sect. 190. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; . . .

Sect. 233. The levee boards shall have and are hereby granted authority and full power to appropriate private property in their respective districts for the purpose of constructing, maintaining, and repairing levees therein; (Followed by provisions for the ascertainment of compensation.)

MISSOURI.

Art. II, Sect. 20. That no private property can be taken for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public.

Sect. 21. That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken.

Art. XII, Sect. 4. The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.

MONTANA.

Art. III, Sect. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.

Sect. 15. The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damage to be sustained by

the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding shall be paid by the person to be benefited.

Art. XV., Sect. 9. The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals; . . .

NEBRASKA.

Art. I., Sect. 21. The property of no person shall be taken or damaged for public use without just compensation therefor.

Art. XI., Sect. 6. The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized or hereafter to be organized, and subjecting them to the public necessity, the same as of individuals.

Sect. 8. No railroad corporation organized under the laws of any other State, or of the United States, and doing business in this State, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of this State.

NEVADA.

Art. I., Sect. 8. . . . Nor shall private property be taken for public use without just compensation having been first made or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterwards made.

Art. VIII., Sect. 7. No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor.

NEW HAMPSHIRE.

Part I., Art. I., Sect. 12. Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . .

Although payment of compensation is not definitely prescribed, the courts hold that compensation is due on principle. See § 227, n. 2.

NEW JERSEY.

Art. I., Par. 16. Private property shall not be taken for public use, without just compensation; but land may be taken for public highways, as heretofore, until the legislature shall direct compensation to be made. (See § 226.)

Art. IV., Sect. 7, Par. 8. Individuals or private corporations shall not be authorized to take private property for public use, without just compensation first made to the owners.

NEW YORK.

Art. I., Sect. 7. When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but, in every case, the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

NORTH CAROLINA.

Although the Constitution of this State does not refer expressly to the right of eminent domain, the right to condemn and the duty to pay compensation are recognized by the courts. See cases in § 227, n. 2.

NORTH DAKOTA.

Art. I., Sect. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid in court for the owner, and no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived.

Art. VII., Sect. 134. The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals.

OHIO.

Art. I., Sect. 19. Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Art. XIII., Sect. 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

OREGON.

Art. I., Sect. 19. Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation, nor, except in case of the State, without such compensation first assessed and tendered.

Art. XI., Sect. 4. No person's property shall be taken by any corporation under authority of law, without compensation being first made, or secured, in such manner as may be prescribed by law.

PENNSYLVANIA.

Art. I., Sect. 10. . . . Nor shall private property be taken or applied to public use without authority of law, and without just compensation being first made or secured.

Art. XVI., Sect. 3. The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals;

Sect. 8. Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or

destruction. The general assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury according to the course of the common law.

RHODE ISLAND.

Art. I., Sect. 16. Private property shall not be taken for public uses without just compensation.

SOUTH CAROLINA.

Art. I., Sect. 23. Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor: *Provided, however,* that laws may be made securing to persons or corporations the right of way over the lands of either persons or corporations, and, for works of internal improvement, the right to establish depots, stations, turnouts, etc.; but a just compensation shall, in all cases, be first made to the owner.

Art. XII., Sect. 3. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

SOUTH DAKOTA.

Art. VI., Sect. 13. Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as a result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

Art. XVII., Sect. 18. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways or improvements,

which compensation shall be paid or secured before such taking, injury, or destruction. The legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases.

TENNESSEE.

Art. I., Sect. 21. No man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

TEXAS.

Art. I., Sect. 17. No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . .

VERMONT.

Chap. I., Art. II. That private property ought to be subservient to public uses when necessity requires it; nevertheless, when any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

VIRGINIA.

Art. I., Sect. 8. That all elections ought to be free, and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected; . . .

This section contains the sole reference to the eminent domain. But the courts recognize the power in all its fulness and also the right to compensation. See *Tait's Exr. v. Central Lunatic Asylum*, 84 Va. 271.

WASHINGTON.

Art. I., Sect. 16. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary

purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Art. XII., Sect. 10. The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

Art. XXI. The use of the waters of this State for irrigation, mining and manufacturing purposes shall be deemed a public use.

WEST VIRGINIA.

Art. III., Sect. 9. Private property shall not be taken or damaged for public use without just compensation; nor shall the same be taken by any company incorporated for the purposes of internal improvement until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporations, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: *Provided*, that, when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

Art. XI., Sect. 12. The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the legislature, of the property and franchises of incorporated companies already organized, and subjecting them to the public use, the same as of individuals.

WISCONSIN.

Art. I., Sect. 13. The property of no person shall be taken for public use without just compensation therefor.

Art. XI., Sect. 2. No municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury.

WYOMING.

Art. I., Sect. 32. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without compensation.

Sect. 33. Private property shall not be taken or damaged for public or private use without due compensation.

Art. X. — Corporations, Sect. 9. The right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals.

Art. X. — Railroads, Sect. 4. Exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking by the legislature of property and franchises of incorporated companies and subjecting them to public use the same as property of individuals.

Art. XIII., Sect. 5. Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes, and the legislature shall provide by law for the exercise upon the part of incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators upon the payment of just compensation, such water as may be necessary for the well-being thereof and for domestic uses.

NOTE. — Provisions enacted prior to 1877 are copied from *Federal and State Constitutions*, etc. (Washington, Government Printing Office, 1877). Provisions of later date are copied from *American Constitutions* (Albany, The Albany Law Journal Co., 1894).

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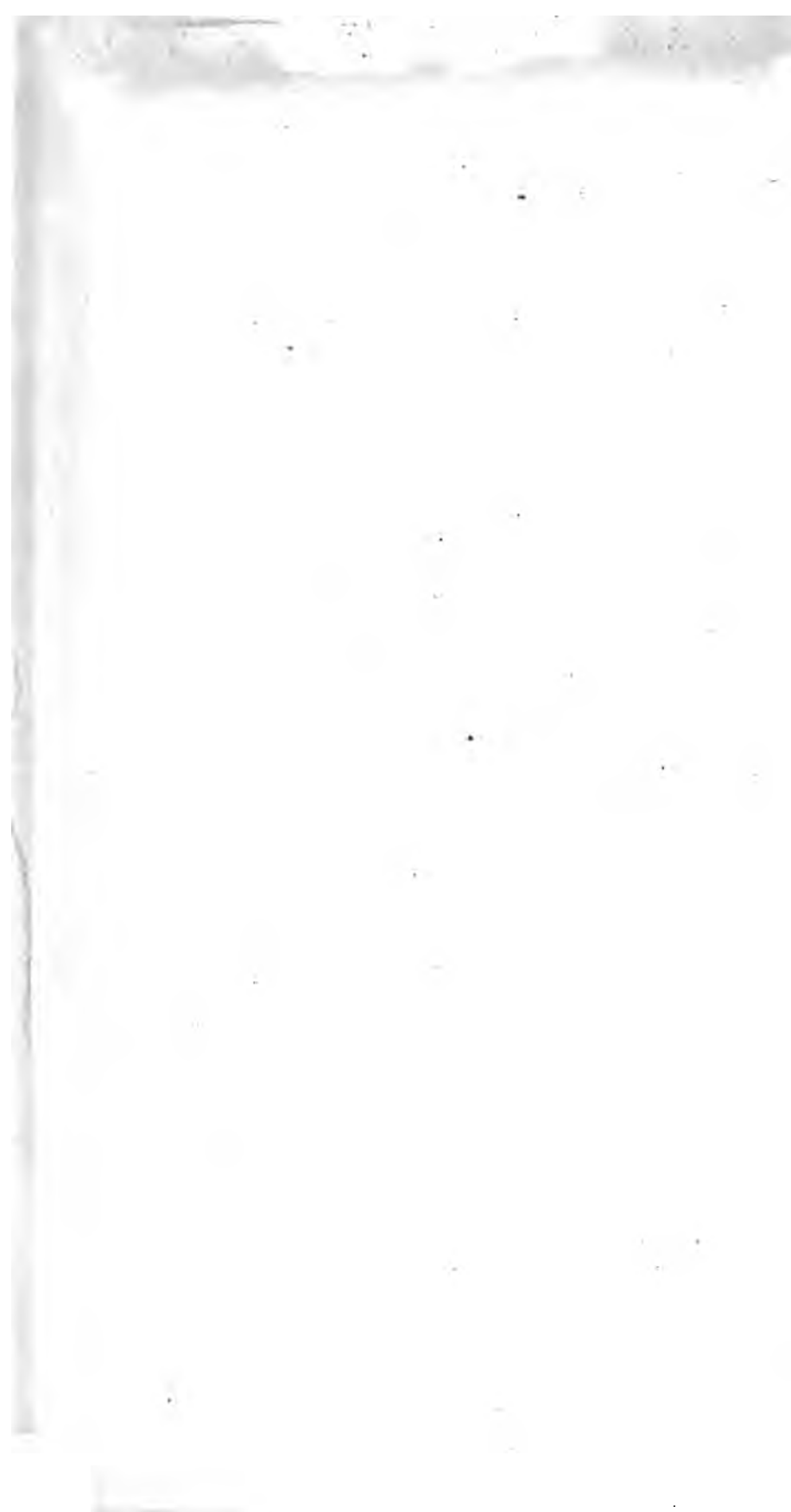
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